

Protecting Indigenous Peoples' Lands and Resources

The Role of the Constitutional Court of Colombia



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1 Introduction

1.1 Indigenous peoples and human rights in Latin America

Over 500 years after the conquest of Latin America begun, the continent's indigenous peoples still exist under conditions of extreme disadvantage compared to the dominant society around them.¹ Dispossession, discrimination and suppression of their customs, practices and institutions have undermined their cultural, social and economic integrity and their prospects for facing the challenges of a changing world. Among the most serious threats to indigenous peoples in Latin America today is the rapid escalation of natural resource extraction, as a globalized economy has made the countries in the region increasingly dependent on resources like timber, minerals and oil. Growing realization of the enormous biodiversity of the tropical rainforests and its potential for economic gain contributes to attracting international investment to heavily indebted countries. Indigenous peoples' territories are often rich in such resources, mainly because the economic practices of their inhabitants are well adjusted to the fragile nature of the environment.² Thus comes the "second conquest"; the scramble of governments and transnational corporations for natural resources on indigenous peoples' lands.³

This development has been accompanied by its opposite; the rise of indigenous movements all over Latin America in protest against neo-liberalism and its detrimental effects on their communities. Gaining in strength and organizational capacity during the past decades, indigenous movements have become a social and political force to be reckoned with in many Latin American countries. Internationally, indigenous peoples' organizations have pressured to put their situation on the agenda of inter-governmental institutions, and their demands to achieve recognition of their cultural integrity and right to self-determination are being met with increasing acceptance.

¹ Anaya (2004) p. 4

² The Rio Declaration on Environment and Development (1992) in its Principle 22 states that: "Indigenous people and their communities (...), have a vital role in environmental management and development because of their knowledge and traditional practices."

³ Rodríguez-Garavito (2005) p. 245

The ILO Convention on Indigenous and Tribal Peoples, Convention no. 169 of 1989, is to date the most comprehensive legally binding treaty on the rights of indigenous peoples. The Convention includes provisions on cultural integrity, land and resource rights and non-discrimination, and instructs states to consult indigenous peoples in all decisions affecting them.⁴ It contains the following definition of indigenous peoples:

Peoples in independent countries who are regarded as indigenous on account of their descent from the populations which inhabited the country, or a geographical region to which the country belongs, at the time of conquest or colonisation or the establishment of present state boundaries and who, irrespective of their legal status, retain some or all of their own social, economic, cultural and political institutions.⁵

Self-identification as indigenous or tribal shall be regarded as a fundamental criterion for determining the groups to which the provisions of this Convention apply.⁶

ILO Convention no. 169 has been ratified by seventeen states, thirteen of which are Latin American.⁷ One of the reasons for the high rate of ratification in Latin America is that the particular history of the continent makes determining exactly who are “indigenous” relatively unproblematic, something which is not the case in Africa and Asia. Another reason is the concerted lobbying for ratification by Latin American indigenous organizations,⁸ taking advantage of a changing political climate. Political transitions in Latin America during the 1980s and 1990s led to a wave of constitutional reforms, with new constitutions being adopted or old ones modified in countries like Guatemala (1985), Nicaragua (1987), Brazil (1988), Colombia (1991), Paraguay (1992), Peru (1993), Argentina (1994) Mexico (modified 1995), Ecuador (1998), and Venezuela (1999).⁹ A major novelty in these constitutions was the recognition of the multiethnic, multicultural nature of Latin American society.¹⁰ The influence of the ILO Convention is marked in several of these constitutions, as they incorporate provisions protecting indigenous peoples’ cultural, social and economic integrity. The Colombian Constitution of 1991 is a good example, and one which merits further study.

⁴ Anaya (2004) p. 59

⁵ ILO Convention 169 (1989) art. 1.1(b)

⁶ *ibid.* art. 1.2

⁷ The following states have ratified ILO Convention 169 by May 2006: Argentina, Bolivia, Brazil, Colombia, Costa Rica, Denmark, Dominica, Ecuador, Fiji, Guatemala, Honduras, Mexico, Netherlands, Norway, Paraguay, Peru and Venezuela.

⁸ Anaya (2004) p. 61

⁹ Political Database of the Americas, (2005)

¹⁰ Van Cott (2000) p. 207, Marino (2003) p. 50

1.2 Problem statement

In this thesis, I will look at the development of indigenous peoples' rights by the Constitutional Court of Colombia. I shall investigate how the legal framework established by the Colombian Constitution of 1991 protects indigenous peoples' rights, and how the Constitutional Court has attempted to improve this protection by incorporating international human rights law and the perspectives of indigenous peoples in its interpretation of the Constitution. In this respect, special attention will be given to the Court's use of anthropological research to help bridge the gap between the Western legal tradition and different cultural realities.

Most human rights issues of indigenous peoples are connected to questions of land, due to the special nature of their relationship with their territories. With this in mind I will focus on the Constitutional Court's cases involving lands and natural resources of indigenous peoples, and look at how the Court relates these questions to fundamental constitutional rights.

After giving an account of relevant parts of the Constitutional Court's jurisprudence, I will proceed to evaluate the effectiveness of the Court's efforts to ensure protection of indigenous peoples' rights. In so doing I will look at the role of the Constitutional Court in Colombian society, and the relation of constitutional justice to social change. To that end I will introduce a concept invented by the Colombian jurist Esteban Restrepo, which merits a brief introduction: "Constitutionalization of daily life" refers to a process by which people's consciousness about their constitutional rights is raised, as the language of the opinions of the Constitutional Court becomes a part of everyday life.¹¹ I will point out positive legal and social effects of the Court's endeavours, as well as indicate discrepancies between the status of indigenous peoples' rights in the legal system and the actual human rights situation in the field. Finally I will investigate what contextual factors may help explain such discrepancies.

1.3 Sources and methodology

My main source is the case law of the Constitutional Court of Colombia, from which I've selected 19 especially illustrative cases dating from between 1992 and 2003, all in all approximately 800 pages of case law. The cases are chosen on the bases of thematic content, the rights involved and the nature of the Court's reasoning, in an attempt to

¹¹ This concept is further explained in chapter 4.2.1

indicate the general character of the Court's jurisprudence as well as eventual incoherencies. Almost all the cases are thematically related to questions of land and natural resources, in an attempt to present the range of rights the Court relates to these issues. To my knowledge, I have included all of the Constitutional Court's cases concerning lands and natural resources of indigenous peoples. A few cases are chosen because they are especially enlightening with regard to the Court's view on cultural diversity and the limits to autonomy, despite not addressing land issues directly. As the Court frequently refers to its own case law to reiterate its position on recurring subject matters, certain landmark cases will be given more attention than others.

The main legal source of the Constitutional Court's jurisprudence is the Political Constitution of 1991. In addition, the Court frequently refers to international human rights treaties ratified by Colombia and jurisprudence of relevant human rights bodies. This body of law composing the Court's main sources is termed the "constitutional corpus"¹², and in my description of the Court's practice this corpus of law will necessarily be a central source. Most prominent is the ILO Convention no. 169, which will be referred to throughout. To indicate how the jurisprudence of the Constitutional Court stands in comparison to international law and jurisprudence on certain issues, I'll consult the International Covenant on Civil and Political Rights (hereinafter ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR); as well as General Comment no. 23 of the Committee on the Elimination of Racial Discrimination (CERD) and the Draft United Nations Declaration on Indigenous Peoples. Following the Constitutional Court, I'll refer to the American Convention on Human Rights (ACHR) as well as the jurisprudence of the Inter-American Court of Human Rights, specifically the "Awas Tingni" case.

Background information on the human rights situation of indigenous peoples in Colombia and generally is taken from reports by United Nations Special Rapporteurs on Indigenous Peoples and independent human rights organizations.

In addition, I will draw on academic literature from several fields, indicative of the inter-disciplinary nature of my research. From the field of law I consult literature related to indigenous peoples' rights in Colombia and internationally, as well as to the legal system of Colombia, especially the institutions and procedures for constitutional justice. The relationship between law and anthropology, particularly how the Constitutional

¹² See chapter 2.3.1, *infra*, for a more detailed description of this concept.

Court has made use of the latter discipline in its case law, is investigated through literature from both fields.

In order to assess the role of the Constitutional Court in society and its effectiveness in protecting constitutional rights, I will look at the relation between law and social change as described in recent Colombian literature on law and society.

Finally, I draw on political and historical literature to interpret how the particular political situation in Colombia may affect the relation between legislation on and implementation of indigenous peoples' rights.

1.4 Background

1.4.1 A history of violence

Colombia has been marked by violence and armed conflict, in different manifestations and degrees of intensity, since the 1940s. Nevertheless, during most of that time the country has experienced a political and economical stability uncommon for the region.¹³ This has not, however, led to greater democratization; rather a powerful oligarchy has consolidated its dominance in the political as well as economic field.¹⁴ The State has for different reasons not been able to differentiate its interests from those of the ruling classes, and as such doesn't appear as a legitimate mediator of social conflicts.¹⁵ A generalized lack of belief in the State institutions combined with weak social movements has resulted in social conflicts being acted out through violent means rather than in the political arena.¹⁶ An armed conflict broke out between the government and various guerrilla forces in the 1960s and is still on-going, fuelled by the drug trade. With the creation of paramilitary groups to aid in the counter-insurgent struggle, the conflict has become "the biggest humanitarian catastrophe in the Western hemisphere", according to United Nations Under-Secretary General Jan Egeland.¹⁷

¹³ Rodríguez (2003) pp. 136-137

¹⁴ *ibid.* p. 137 "Oligarchy" is here taken to mean a small segment of society which controls most of the country's political and economic power, and whose power extends through generations.

¹⁵ *ibid.* p. 138

¹⁶ *ibid.* p. 139

¹⁷ Press briefing on Colombia by Emergency Relief Coordinator (2004)

1.4.2 The indigenous population of Colombia

Official Colombian figures place the indigenous population at approximately 785.000 persons, representing 1,83 % of the total population of the country.¹⁸ This population is spread out through all the 32 departments of the country, and the cultural and demographic diversity within the indigenous minority is enormous. Different sources place the number of indigenous peoples between 81 and 90, as precise delimitation of related cultural and linguistic groups is difficult in some cases.¹⁹ Of these peoples, 39 have a population of less than 1000 members, some of them even less than 100, and only four peoples have over 50 000 members.²⁰ The huge geographic diversity of Colombia have contributed to very different living conditions and cultural characteristics of the country's indigenous peoples, making general observations about their situation and their relationship to the majority society difficult to make. However, history shows that indigenous peoples have generally been treated as unequal citizens of Colombia, whether under the paternalistic protection system of the Spanish Crown or the assimilationist policies carried out by the State since independence in 1824. In the last fifty years, two trends stand out in the history of indigenous peoples: On the one hand there has been a growing recognition of their status as equal citizens and subjects of rights, beginning in the 1960s and gaining momentum with the new Constitution of 1991. On the other, the internal, armed conflict has increasingly affected indigenous peoples all over the country, leading to an alarming escalation of violations of human rights and international humanitarian law.²¹ Indigenous organizations have since the 1970s taken an active role in fighting for their rights to land and cultural integrity, a process crowned with the participation of indigenous peoples in the Constitutional Assembly in 1991. A central claim has been legal recognition of their traditional lands, and since 1980 an increasingly coherent policy of granting collective ownership titles to indigenous reserves called *resguardos* has been established. As of December 2001, 638 *resguardos* were in existence, with a population of 682.500 and a total area of 30,8 million hectares, representing 27 % of the national territory.²² This legal recognition of collective titles has been central in strengthening indigenous peoples' rights on a more general level. However, not all indigenous peoples enjoy the benefits. Some have not

¹⁸ Sánchez (2004) p. 62 (Data from 2001)

¹⁹ *ibid.* p. 69, Stavenhagen (2004a) p. 5

²⁰ Sánchez (2004) pp. 70-71

²¹ Villa (2005) pp. 14-16

yet received title to their lands; others have clearly insufficient territories for the size of their population. Another frequent problem is the occupation of large parts of the *resguardos* by non-indigenous colonists, often cultivators of illicit crops.²³

1.4.3 Main human rights issues of indigenous peoples

1.4.3.1 Armed conflict and the drug industry

The violence against indigenous peoples has augmented since the early 1990s, as they have been increasingly subjected to the logic of the internal armed conflict raging in the country. Over the past 15 years, more than 2660 cases of violations of human rights and international humanitarian law aimed at indigenous peoples have been reported.²⁴ The real figures are probably much higher, as many violations aren't reported for fear of reprisals.²⁵ Members of indigenous communities have been victims of massacres, forced recruitment, selective killings, forced disappearances and forced displacement of entire communities, and the rate of violence against indigenous persons is three times higher than the national average, already among the highest in the world.²⁶ An estimated 12 % of Colombia's displaced people are indigenous;²⁷ and the special relationship of these peoples to their lands deepens the trauma of displacement. Indigenous leaders and spokespersons are being specifically targeted, apparently as part of a strategy to destroy the organizational capacity of their communities. Stavenhagen calls this practice of intentionally causing social and cultural disintegration of indigenous communities "truly acts of genocide and ethnocide".²⁸ The main violators are paramilitary groups (which have been linked with the army and government authorities²⁹), but guerrilla forces and state security forces are also responsible for grave and systematic violations, as none of the armed actors respect the distinction between combatants and non-combatants.³⁰ In the polarized environment of the Colombian armed conflict, the indigenous communities' efforts to remain neutral have led to them being suspected by all sides of collaborating with the enemy. In

²² Sánchez (2004) p. 115

²³ Ortega (2000) p. 50

²⁴ Stavenhagen (2004a) p. 9

²⁵ *ibid.* p. 12

²⁶ Villa (2005) p.41-54

²⁷ Stavenhagen (2004a) p. 11

²⁸ *ibid.* p. 9

²⁹ *ibid.*

³⁰ *ibid.* p. 10; Villa (2005) p. 26

addition, their traditional territories often have strategic military importance, making the submission of the population a priority for the armed groups.

The armed conflict in Colombia has become increasingly connected to cultivation and trafficking of illicit drugs,³¹ and territories of indigenous peoples have become invaded by the commercial plantations of the drug mafias, the paramilitaries and the guerrillas, with a resulting escalation of violence and environmental degradation. The influx of people connected to the drug business threatens to destroy the traditional way of life in indigenous areas, introducing an illicit money economy, weakening traditional authority and submitting inhabitants to “the rule of the gun”.³² On the other hand, the government’s policy of eradicating drug crops by glyphosate spraying is reported to cause severe environmental damage, in addition to destroying subsistence crops and causing direct harm to the health of the indigenous inhabitants, including birth defects.³³

1.4.3.2 Natural resource exploitation

The natural environment of indigenous peoples in Colombia is under great pressure due to economic activities such as natural resource extraction and commercial farming, and to the construction of great infra-structure projects like dams and highways.³⁴ The territories of indigenous peoples are in many cases largely unexploited lands, with enormous potential for economic gain. Colombia is among the most biologically diverse countries on earth, and the traditional knowledge and practices of indigenous peoples have contributed greatly to this biological treasure remaining intact. Extractive industries like mining, oil drilling and logging are having seriously adverse effects on the environment, especially in fragile ecosystems like tropical rainforests, on which many indigenous peoples depend for their survival. Of special concern is the dire situation of the smallest indigenous groups, many of them on the brink of extinction as a result of the destruction of their living conditions and means of subsistence.³⁵

This situation is aggravated by the fact that many indigenous peoples still have unresolved claims for legal title to their lands, and even those that do live in legally constituted *resguardos* face difficulties in protecting their land. Ineffective institutions coupled with the strength of the economic interests involved often ensure that resource

³¹ Stavenhagen (2004a) p. 13

³² Ortega (2000) p. xxix

³³ *ibid.* p. xxix-xxx; Stavenhagen (2004a) p. 14

³⁴ Stavenhagen (2004a) p. 15

extraction projects are carried out without proper consultation of the indigenous inhabitants.³⁶ In some areas, campaigns of systematic violence are being carried out against indigenous peoples that resist economic development of their territories, causing their forced displacement or virtual extinction. Financed by actors with vested economic interests in indigenous territories and carried out by paramilitary groups, such violence is intended to force indigenous communities into giving their formal acceptance of economic mega-projects on their land or, failing that, to displace the rightful owners of the land. The State has often been unable or unwilling to provide adequate protection against such violent coercion by private actors, as can be ascertained by the repeated requests by the Inter-American Commission on Human Rights for precautionary and provisional protection measures for indigenous communities.³⁷

³⁵ *ibid.* p. 16 Of the indigenous peoples of the Colombian Amazon, 40 % are thought to be at high or very high risk, and at least 12 are close to extinction. See: ONIC (2006)

³⁶ Stavenhagen (2004a) p. 16.

³⁷ See *i.e.* Inter-American Commission on Human Rights (2001); Resolución sobre Medidas Provisionales: Caso Pueblo Indígena Kankuamo (2004)

2 The Constitution of 1991 and the role of the Constitutional Court

2.1 Introduction

This chapter will provide background information on the general content and character of the Constitution of 1991 and the judicial mechanisms created to ensure its implementation. In addition, the role of the Constitutional Court and the general character of its practice in its first 15 years of existence will be introduced. The Constitution's treatment of indigenous peoples' rights will be analyzed within the framework of the international human right to self-determination, drawing on Anaya's arguments on how this right relates to indigenous peoples.

2.2 The Constitution of 1991

Reflecting the Colombian population's weariness of corruption and violence, in 1990 wide-spread social pressure spearheaded by the student movement demanded the creation of a new, more inclusive and democratic constitution, which could help reconcile the social forces and re-establish and legitimize the political order in the country.³⁸ Upon seeing the massive popular support this initiative received in a referendum the same year, the government issued measures summoning the National Constitutional Assembly. The Assembly was composed of representatives from a wide range of social and political sectors of Colombian society; workers, academics, students, the traditional political oligarchy, indigenous peoples (for the first time participating in a political decision-making process of national importance) and representatives of recently demobilized guerrilla groups.³⁹

The Constitution that was finally adopted on July 4 1991 was progressive in its social and democratic content. It included an extensive bill of fundamental rights; political, social, economic, cultural, environmental and collective, and established efficient mechanisms for their protection.⁴⁰ The fundamental principles of the Constitution declared Colombia to be a "social state of law", "democratic, participatory and

³⁸ Restrepo (2002) p. 3; Rodríguez (2003) p. 141

³⁹ Restrepo (2002) p. 3; Rodríguez (2003) p. 141

⁴⁰ Restrepo (2002) p. 3; Rodríguez (2003) p. 157

pluralist”, and “founded on the respect for human dignity.”⁴¹ Special attention was given to the principle of equality of all citizens, with article 13 establishing the special right to protection of “marginalized and oppressed groups” and prohibiting discrimination on the grounds of sex, race, national or family origin, language, religion, political and philosophical opinion.⁴²

2.2.1 Judicial mechanisms for protection of constitutional rights

Chapter 4 of the Constitution established a series of judicial mechanisms designed to protect the constitutional rights of the citizens.⁴³ Of these, the mechanism of *acción de tutela* (hereinafter *tutela*) has proven to be the most important in terms of access and effectiveness.⁴⁴ Van Cott translates *tutela* as “writ of protection”, and calls it “*the citizen’s primary defence against the violation of fundamental constitutional rights*”.⁴⁵ Created in article 86 of the Constitution, it permits all persons whose fundamental rights are threatened by the action or omission of any public authority, to claim the immediate protection of those rights (Even when the actual threat or damage to the person’s rights is coming from an individual or a private entity).⁴⁶ Generally, the “fundamental” rights of the Constitution are civil and political rights rather than social or cultural rights. Nevertheless, the jurisprudence of the Constitutional Court has established that the legal action of *tutela* can be employed whenever the right being violated is directly connected with a fundamental right.⁴⁷ It is a fast-track procedure whose aim is to prevent irreparable harm from occurring to the plaintiff. Cases must be resolved within ten days of their registration, and the *tutela* mechanism can only be employed when no other legal mechanism is available or when there is an immediate danger of irreparable harm to a fundamental right. As long as these necessary conditions are met, the Constitutional Court has determined that the mechanism can be employed by any person, legal as well as physical.⁴⁸ *Tutela* actions can be brought before any judge in the country, and decisions may be appealed to a higher court. All *tutela* decisions reach the

⁴¹ Political Constitution of Colombia (1991) art. 1 (My translation)

⁴² Restrepo (2002) p. 3

⁴³ In contrast, the previous constitution had a very inadequate list of rights and no mechanisms for their direct application. See Rodríguez (2003) p. 157

⁴⁴ In the first ten years of the new Constitution, over 450 000 *tutelas* were brought before the courts. See *ibid.* pp. 156-162 for an empirical analysis of the *tutela* action.

⁴⁵ Van Cott (2000) p. 213

⁴⁶ Rodríguez (2003) p. 158

⁴⁷ *ibid.* p. 159

⁴⁸ Sentence T-257/93, section II.3

Constitutional Court, which reviews those that it considers most important (approximately 1 percent of all cases).⁴⁹ The Constitutional Court's rulings are both final and of mandatory compliance.

In addition to *tutelas*, the people of Colombia may seek a ruling of the Constitutional Court through the public action of unconstitutionality.⁵⁰ This legal action requests that the Court declare unconstitutional a law or a decree with the force of law, and doesn't require any violation of the plaintiff's rights for the case to be presented.

Two other mechanisms exist for the protection of constitutional rights: One of them (*acción de cumplimiento*) gives citizens the right to use the Court system to demand the fulfilment of laws or administrative regulations, in cases where negligence or tardiness of authorities leads to a serious damage to the person.⁵¹ The other is the public action of protection of collective rights (hereinafter *acción popular*), related to the fields of public health and order, the environment, free economic competition etc.⁵² None of these two mechanisms are the competence of the Constitutional Court.

2.3 The role of the Constitutional Court in the defence of human rights

The 1991 Constitution created the Constitutional Court and charged it with "guarding the integrity and supremacy of the Constitution".⁵³ Ever since its inception, the Court has worked to ensure that the principles of the Constitution do not remain just words on paper, but instead become effective guarantees of the rights of ordinary citizens.⁵⁴ Its efforts have often been involved in controversy, as powerful sectors of society and even of the judicial branch have resisted its independence and the progressive manner in which the Court has interpreted both the Constitution and the scope of its mandate.⁵⁵ Its expansive understanding of human rights and the importance of constitutional justice for their protection has prompted writers like Rodríguez-Garavito to call it "*the vanguard of an activist judiciary and a progressive 'new constitutionalism'*".⁵⁶ Throughout its history, the Court has made many controversial decisions protecting individuals' rights, such as the decriminalization of drug consumption and euthanasia.⁵⁷

⁴⁹ Rodríguez (2003) p. 159

⁵⁰ Restrepo (2002) p. 7; Rodríguez (2003) p. 157

⁵¹ Rodríguez (2003) p. 177

⁵² Political Constitution of Colombia (1991) art. 88

⁵³ *ibid.* art. 241(My translation)

⁵⁴ Restrepo (2002) p. 4

⁵⁵ Rodríguez (2003) p. 157

⁵⁶ Rodríguez-Garavito (2005) p. 251

⁵⁷ Rodríguez (2003) p. 157

It has also placed great emphasis on the protection of vulnerable and traditionally discriminated groups or minorities, such as women, indigenous peoples, afro-Colombian communities, AIDS patients, homosexuals, children, the elderly, handicapped persons, prisoners and religious minorities.⁵⁸ Another important aspect of the work of the Constitutional Court has been to combat authoritarian tendencies in Colombian institutions on all levels, especially restricting the use of state of emergency powers by the executive.⁵⁹

The finding that any kind of right, including economic, social and cultural rights, can be subject of *tutela* if it's directly connected to a fundamental right is significant, as it opens the doors of the judicial system to the very real and immediate social and economic needs of the population, such as the right to health and dignified housing standards.⁶⁰

In sum, it can be said that the judicial activism of the Constitutional Court has seen it align itself with the oppressed groups of society, challenging the traditional power-holders of Colombia.⁶¹ This does not mean that the Court has allowed itself to become an instrument of politics, other than in the sense that upholding the principles of the Constitution necessarily implies taking an active stand in the struggle for a more just and equal society.

A salient characteristic of the Court's efforts to protect the integrity of the Constitution is its practice of interpreting the constitutional rights in accordance with the social, cultural and political context of each case, including drawing upon philosophy and social sciences to throw light on the meaning of the constitutional provisions in each particular situation.

2.3.1 The "constitutional corpus"

Article 93 of the Constitution declares that international treaties and conventions on human rights that have been ratified by Congress have prevalence in the national legal

⁵⁸ *ibid.* p. 157; Restrepo (2002) p. 4

⁵⁹ Although Colombia has rarely seen its constitutional democratic order disrupted by dictatorships, the use of special powers under states of emergency was almost a constant during the last half of the 20th century. For 32 of the 42 years between 1949 and 1991 a state of emergency was in force in Colombia. See Rodríguez (2003) p. 144 and Restrepo (2002) p. 4

⁶⁰ The social inequalities in Colombia are huge and well entrenched. 64 % of the population exist below the national poverty line. 22,6 % live on less than 2 \$ a day, while 8,2 % live on less than 1 \$ a day. Colombia has a score of 57,6 on the Gini index, measuring (in)equality of distribution of wealth. Source: United Nations Development Programme (2005)

⁶¹ Restrepo (2002) p. 4

hierarchy. Further, that the rights and duties of the Constitution shall be interpreted in accordance with international human rights treaties ratified by Colombia. The Constitutional Court has elaborated on this article in order to clarify the status of international human rights norms vis-à-vis the Constitution. In so doing it introduces the concept of “constitutional corpus”:

The constitutional corpus is composed of those norms and principles that, without being explicitly stated in the articles of the constitutional text, have been normatively integrated with the Constitution by different mechanisms and in accordance with the Constitution, and are used as parameters of control of the constitutionality of the laws. They are true principles and values of constitutional rank (...).⁶²

The Court has later clarified that the constitutional corpus consists of the Political Constitution; all treaties of human rights and international humanitarian law ratified by Colombia; as well as the jurisprudence of the international organs charged with the interpretation of those treaties (the United Nations treaty bodies, the ILO committees, the Inter-American Commission of Human Rights and the Inter-American Court of Human Rights.)⁶³ This greatly enhances the potential for effective legal protection of human rights in Colombia, and prevents using reference to internal laws as excuse for non-compliance with international human rights law. When the Constitution was created, it was the intention of the Constitutional Assembly that Congress should create implementing legislation for the bill of rights included in the Constitution.⁶⁴ In some cases, even 15 years later, this has still not happened,⁶⁵ leaving the text of the Constitution as the only source of interpretation of the scope and content of constitutional rights. In this context it is clear that the work of the Constitutional Court has been made easier by article 93’s provision of interpreting the rights and duties in the Constitution in accordance with international human rights treaties. An example of this is the frequent reference to ILO Convention 169 in cases involving indigenous peoples, as well as to the jurisprudence of the Inter-American Court of Human Rights.

⁶² Sentence C-225/95 (My translation)

⁶³ Sentence T-568/99; Sentence C-010/00

⁶⁴ See *i.e.* Political Constitution of Colombia (1991) art. 329 (on indigenous territories and other territorial entities of the State) and art. 246 (on coordination of indigenous and national law). On the latter subject, see Van Cott (2000) pp. 215-217.

⁶⁵ This is the case with *i.e.* The Organic Law of Territorial Regulation (Ley de Ordenamiento Territorial), which art. 329 of the Constitution states shall regulate the coordination and relations between indigenous territories and other territorial entities of the State.

2.4 Indigenous peoples and self-determination in the Constitution of 1991

2.4.1 Self-determination of indigenous peoples

Underlying the struggle for indigenous peoples' rights is the question of self-determination, which has been subject of widely differing interpretations since it was set down in common article 1 of ICCPR and ICESCR in 1966:

1. All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.
2. All peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic cooperation, based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence.⁶⁶

Self-determination is generally considered a principle of customary international law and even *jus cogens*, a peremptory norm. (Peremptory norms are considered so fundamental that no nations may derogate from them whatever the circumstances, irrespective of their treaty obligations.) Governments have been, and many to some extent still are, very reluctant to the idea that indigenous groups should be considered "peoples" with the right to self-determination. This fact is partly responsible for the extra-ordinary difficulties in agreeing on the text for the United Nations Declaration on Indigenous Peoples, as delegates of governments and indigenous peoples' organizations argue about whether to call the groups in question "people", "peoples" or even "populations". The drafters of ILO Convention 169 avoided the problem by inserting a qualifying clause in article 1.3: "*The use of the term peoples in this Convention shall not be construed as having any implications as regards the rights which may attach to the term under international law*" (emphasis in the original).

According to Anaya the resistance against acknowledging the right of indigenous peoples to self-determination is based on the misconception that self-determination equals a right to independent state-hood.⁶⁷ This misunderstanding is due to the political context in which the right to self-determination was first invoked, that is the process of decolonization which led to a host of new states being founded. However, this particular characteristic of the decolonization process was a remedial and not a substantive

⁶⁶ ICCPR (1966) art. 1 and ICESCR (1966) art. 1

⁶⁷ Anaya (2004) p. 103

element of self-determination.⁶⁸ It was intended to remedy the historic suppression of the right to self-determination of colonized peoples, and independent statehood was the preferred option in that particular historic context. Indigenous peoples all over the world have been oppressed for centuries and to a large extent continue to live in conditions of marginalization and inequality, and there is no morally relevant difference between them and other colonized peoples. Nevertheless, the appropriate remedial measures to ensure their self-determination may not be secession and independent statehood. Indeed it would in most cases be a cure worse than the disease, as Anaya puts it.⁶⁹

Anaya rejects the dichotomy of internal (rights of political participation) vs. external (freedom from alien rule) self-determination, as it builds on a conception of “peoples” as mutually exclusive spheres of community, organized by statehood.⁷⁰ This conception inadequately captures the multiple patterns of human association that exist in the world,⁷¹ and Anaya instead proposes a substantive/remedial approach to self-determination.⁷² He argues that the substance of self-determination consists of two normative strains: the *constitutive* aspect which requires that the creation of governing institutions reflect the will of the people concerned,⁷³ while the *on-going* aspect of self-determination requires a governing order in which people may participate meaningfully in all spheres of their lives on a continuous basis.⁷⁴ The need for remedial self-determination arises from the historic and continuing denial of the substantive elements of self-determination to a people, and the appropriate remedy is group- and context specific,⁷⁵ as illustrated by the comparison between indigenous peoples and other colonized peoples.

2.4.2 Constitutional provisions for self-determination of indigenous communities

The participation of indigenous representatives in the Constitutional Assembly secured the introduction of a series of articles outlining the special rights and legal status of indigenous peoples in the Constitution of 1991. To assess whether the Constitution

⁶⁸ *ibid.* p. 104

⁶⁹ *ibid.* p. 109

⁷⁰ *ibid.* p. 105; Ostby (2003) p. 235

⁷¹ Anaya (2004) p. 105

⁷² Ostby (2003) p. 234

⁷³ Anaya (2004) p. 104-105

⁷⁴ *ibid.* p. 106

⁷⁵ *ibid.* pp. 106-107; Ostby (2003) p. 235

reflects the unique needs and interests of indigenous peoples, it is useful to analyze it within the framework of Anaya's concept of self-determination. In Anaya's analysis, substantive self-determination contains five elements: non-discrimination, cultural integrity, security of lands and natural resources, self-government and entitlements of social welfare and development.⁷⁶ All these subjects are addressed in the Colombian Constitution of 1991, and most are elaborated on by the Constitutional Court in its jurisprudence, as we shall see in chapter 3.

The Constitution does not use the term "self-determination", but the provisions outlining the autonomy given to indigenous communities indicate that the Constitutional Assembly embraced a version of self-determination similar to that described by Anaya. The reference in article 1 to the pluralist character of the State and the recognition in article 7 of the ethnic and cultural diversity of the Colombian Nation, using "Nation" in the singular, speak of ethnically and culturally diverse human groups sharing a common identity: that of belonging to the overarching Colombian nation.⁷⁷ The Constitution thus recognizes the multiethnic and multicultural character of the State and protects the right to diversity of the national minorities.⁷⁸ This is a recognition of the multiple, overlapping and interdependent spheres of community and identity that Anaya says characterizes the human experience,⁷⁹ and as such it differs from the more restrictive view of self-determination as the domain of mutually exclusive cultural groups which depend on independent statehood to be able to "freely pursue their economic, social and cultural development".⁸⁰

Further provisions were inserted into the Constitution to ensure that equal treatment and respect be given to all individuals and groups, including special protection of vulnerable minorities. Article 8 declares the State duty to protect the cultural and natural wealth of the nation, which the Constitutional Court has interpreted to include the protection of indigenous peoples and their natural environment. The equal respect for the different cultures of the country (articles 13 and 70), is further developed in the recognition of indigenous languages as official in their territories and the right to a bilingual education (article 10) that respects and develops the cultural identity of minority ethnic groups (article 68).

⁷⁶ Ostby (2003) p. 235; Anaya (2004) p. 129

⁷⁷ Sentence T-634/99, section II.1.3

⁷⁸ Marino (2003) p. 53

⁷⁹ Anaya (2004) p. 101

⁸⁰ ICCPR (1966) and ICESCR (1966) art. 1.1

Article 1's reference to the pluralist, democratic and participative character of the State and to the autonomy of its territorial entities includes the key elements of the norm of self-government, which Anaya calls "the over-arching political dimension of on-going self-determination"⁸¹:

In the particular context of indigenous peoples, notions of democracy (including decentralized government) and of cultural integrity join to create a *sui generis* self-government norm. The norm includes two distinct but interrelated strains. One upholds spheres of governmental or administrative autonomy for indigenous communities; the other seeks to ensure the effective participation of those communities in all decisions affecting them that are left to the larger institutions of decision making.⁸²

These elements are further developed in the Constitution, as summed up by the Constitutional Court in case T-188/93 of 1993:

The indigenous communities, "groups of families of Amerindian descent that identify themselves with their aboriginal past and maintain traits and values of their traditional culture, as well as forms of government and social control that distinguish them from other rural communities" (Decree 2001 of 1988, art.2), enjoy a special constitutional status. They form a special constituency for the election of Senators and Representatives (articles 171 and 176), they exercise jurisdictional functions within their territories in accordance with their own norms and procedures, as long as they're not contrary to the Constitution or the laws (article 246), they are governed by indigenous councils in accordance with their customs and practices and in conformity with the Constitution and the law (article 330) and their territories or *resguardos* are their collective property, by nature inalienable, imprescriptible and unseizable (articles 63 and 329).⁸³

The two-fold requirement of participation and autonomy is explicitly addressed; as on the one hand indigenous peoples are guaranteed a minimum of representatives in Congress,⁸⁴ and on the other they are given autonomy to rule their own affairs within their territories. Many indigenous communities maintain traditional governing institutions and systems of social control, including mechanisms for conflict resolution

⁸¹ Anaya (2004) p. 150

⁸² *ibid.* p. 151

⁸³ Sentence T-188/93, section II.1. The definition of indigenous communities referred to was introduced in Presidential Decree 2001 of 1988, enacted the year before ILO Convention 169 was created. As the Constitution doesn't include a definition of indigenous peoples, the Constitutional Court has generally taken the definition of Decree 2001 as point of reference. However, the definition of indigenous and tribal peoples employed in the ILO Convention is also considered valid by the Court, allowing for afro-Colombian communities, the largest among the ethnic minorities of the country, to be covered by the ILO Convention as a "tribal people". See Sentence C-169/01, section V.3.2.2

⁸⁴ Indigenous candidates may participate in the ordinary, territorially-based election for seats in Congress. But as a minimum indigenous peoples are guaranteed one seat in the House of Representatives and two seats in the Senate, elected from a special indigenous constituency. See arts. 171 and 176 of the Constitution and art. 1 of Law 649 (2001). Also see Sentence C-169/01.

and adjudication.⁸⁵ As a logical consequence of the constitutional principle of cultural pluralism, indigenous communities have the right to govern themselves according to their own precepts, whether they take the form of traditional customary law or rather as norms of more contemporary origin, chosen by the community in adaptation to their changing circumstances. The autonomy of indigenous communities is limited geographically by the boundaries of their territories, and legally by the principles of the Constitution. This legal limit could in practice easily contradict the principles of protection of jurisdictional autonomy and cultural integrity, as the Constitution and the laws belong to a Western, liberal frame of reference which frequently contrasts with customary law of indigenous peoples. In order to make sure that the autonomy of indigenous peoples isn't reduced to a hollow concept without real effectiveness, the Constitutional Court has ruled that the autonomy and cultural integrity of indigenous peoples may only be restricted to protect even more fundamental constitutional principles or international human rights, such as the right to life, freedom from slavery and torture, and national security.⁸⁶

2.5 Concluding remarks

The Constitution of 1991 is a very progressive legal document of a markedly social and democratic nature. The popularity of the *tutela* action indicates that constitutional justice has become a favoured way for seeking protection of fundamental rights, making the Constitutional Court an important institution in Colombian society.

With regard to the situation of indigenous peoples, we find that all the substantive elements of self-determination, as defined by Anaya, are addressed in the Constitution. However, the broad and general character of the constitutional principles as well as the lack of implementing legislation, have made it necessary for the Constitutional Court to carry out an extensive labour of interpreting the scope, content and weight of indigenous peoples' rights in Colombia. The Court's rulings on the relative weight of cultural diversity versus other constitutional rights are but one example. Chapter 3 will focus on the important efforts of the Constitutional Court to interpret the Constitution in accordance with the principle of cultural diversity, and by logical connection also try to achieve the fulfilment of substantive self-determination of indigenous peoples.

⁸⁵ Anaya (2004) pp. 151-152

⁸⁶ See i.e. Sentence T-523/97; Sentence T-349/96; Van Cott (2000) pp. 217-218; and Botero (2004) pp. 70-76.

3 The Constitutional Court's development of indigenous peoples' rights

3.1 Indigenous peoples as collective subjects of rights

The Constitution of 1991 recognizes both individual and collective rights, and different mechanisms for their protection were outlined in chapter 2. In the case of indigenous peoples, the community takes on a special importance which is not adequately reflected by the dichotomy individual-collective. In the landmark case T-380/93 of 1993, the Court declared that an indigenous community is in itself a holder of fundamental rights.⁸⁷ The bases for this finding are the Constitution's articles 1, 7 and 8, which declare Colombia to be a pluralist State that recognizes and protects the ethnic and cultural diversity and the cultural wealth of the Colombian nation.⁸⁸ In order to adequately protect this diversity, it is necessary to try to understand the many different ways of life and forms of comprehending the world of the minority ethnic groups existing in the country. In the case of indigenous peoples, the Court accepts that individual members of these communities to a large extent achieve their personal realization through their group. For some indigenous peoples, an existence separated from the community would be incomprehensible, as it is only as integral parts of a whole that the individual may live meaningfully. This is one of the reasons why the concept of individual human rights is not always easily understood or accepted by indigenous peoples,⁸⁹ especially those who've been relatively isolated from Western systems of thought. To quote the Court:

To restrict the recognition of fundamental rights to belong exclusively to individuals, dismissing systems of thought that don't allow an individualist understanding of the human person, would be contrary to the constitutional principles of democracy, pluralism, respect for ethnic and cultural diversity and protection of the cultural wealth of the nation.⁹⁰

The existence of the community as an integrated whole transcends that of its individual members and depends on a variety of factors, both material and spiritual. It may be

⁸⁷ Sentence T-380/93, section. II.8. I shall return to this case throughout, at this moment I will only address the question of the community as a rights-holder.

⁸⁸ Political Constitution of Colombia (1991)

⁸⁹ Ekern (2003) p. 12

⁹⁰ Sentence T-380/93, section II.8 (My translation)

affected by external factors such as war or changes in its natural habitat, or by internal dynamics such as power struggles and factional disputes. In this line of thought the community as a subject has vital interests on which its existence depends, and those interests might differ from the interests of some community members. In order to adequately protect this collective form of existence the community as a whole must be granted the status of rights holder. In the opinion of the Court, the constitutional guarantee of recognition and protection of ethnic and cultural diversity would amount to mere rhetoric if indigenous communities weren't also granted legal personality with which to defend their fundamental rights⁹¹:

The defence of diversity cannot be carried out with a paternalist attitude, nor be held victim by the actions of individual members of the community, when it is the very community that may find its sphere of vital interests negatively affected. For this reason the community must assume the protection of its own rights and the defence against damage or threats that could lead to its extinction (Constitution arts. 1 and 7).⁹²

This move away from paternalism to full recognition of indigenous communities as subjects of rights is an important victory in indigenous peoples' struggle for autonomy. As groups, indigenous communities have fundamental rights much like those of individuals. Although these by definition are collective rights, the Court emphasizes that they mustn't be confused with the collective rights of other groups, such as the national community as a whole. "*The indigenous community is a collective subject and not a mere sum of individuals that share certain rights and general interests*".⁹³ This is why indigenous communities may use the mechanism of *tutela* in order to have their fundamental rights protected, whereas ordinary collective rights are to be protected through the mechanism of *acción popular*.⁹⁴

The indigenous communities' own authorities are endowed with the power to act as the communities' legal representatives. However, conditions of geographic isolation, economic weakness and scant knowledge of the legal system of the majority society often makes indigenous communities choose to be represented by external specialists, a practice the Court considers to be justified.⁹⁵ In many *tutela* cases brought before the Constitutional Court, human rights organizations have provided legal and administrative

⁹¹ ibid. section II.8.

⁹² ibid. (My translation)

⁹³ ibid.

⁹⁴ The Court's jurisprudence is not entirely consistent on this point. See note 147, *infra*.

⁹⁵ Sentence T-380/93, section II.9

aid to the communities involved.⁹⁶ In other cases, public authorities such as the Ombudsman's office and the Procurator General's office have represented indigenous communities in *tutela* proceedings, even against other state institutions.⁹⁷

3.2 The powers and legitimacy of indigenous leaders

Article 330 of the Constitution declares that indigenous territories shall be governed by "councils", the form and regulations of which shall be in accordance with the customs and practices of their communities. These authorities are given a series of functions to exercise, in addition to whatever responsibilities they may be given by their communities. Among the functions they are given by the Constitution, indigenous authorities must watch over the preservation of the natural resources in their territories, collect and distribute economic resources, design policies and plans for economic and social development of their territories and act as community representatives. The Constitution does not specify any one kind of traditional authority, but leaves that open to the customary practices of each indigenous people. However, the most common form of leadership of *resguardos* in Colombia today is the *cabildo*, a form of community council originally created by the colonial authorities to represent the indigenous communities in an area, and later adopted and retained by the communities themselves. The institution was officially recreated by the Colombian government in 1988, when Presidential Decree no. 2001 defined them thus: "*The indigenous cabildos are special public entities charged with legally representing their groups and exercising the functions given to them by the law, their customs and practices.*"⁹⁸

The *cabildos* have generally been seen by state institutions as the default indigenous authorities with which to interact, but an important case of the Constitutional Court from 1998 has questioned this. Case T-652/98 dealt with a *tutela* demanding protection of the fundamental rights of the Embera-Katío people of the Alto Sinú region. This people inhabit small villages scattered throughout their ancestral territory, which for administrative reasons of the State was divided into two *resguardos* instead of one at the time of formalization of their collective property.

In the 1990s, large parts of their territory were flooded by a dam that was constructed as part of a major hydro-electrical project. As no process of prior consultation had been

⁹⁶ *i.e.* *ibid.*, Sentence T-652/98, Sentence SU-383/03

⁹⁷ *i.e.* Sentence SU-039/97

⁹⁸ Presidential Decree 2001 (1988) art 2. Cited in Sentence T-652/98, section 7 a)

carried out with the affected communities, the private company building the dam and the State institutions responsible for granting the environmental license for the project were held responsible for violations of a number of fundamental rights.

At the time of the establishment of the two *resguardos*, the communities of each *resguardo* had formed a *cabildo mayor* to represent them. However, internal differences of the communities led to discontent with the leadership, and in one of the *resguardos* an alternative *cabildo mayor* was established. As a result of this internal power struggle, the local state authorities chose to freeze all contracts with the indigenous communities until the question of authority was resolved.

In the Court's treatment of the case, it was established that the traditional political organization of the Embera-Katíos is decentralized; traditional authority being held by leaders of extended families that share villages in a communitarian manner. There is no tradition in the Embera-Katío culture for accepting a higher political authority than the village, except for fleeting alliances to counter common threats such as invasion.⁹⁹ The Constitutional Court considered that the local authorities' insistence on only accepting the legal authority of a *cabildo mayor* amounted to pressuring the Embera-Katíos to accept an alien form of government, through which they were not able to protect their interests properly and which eventually led to a harmful internal struggle.¹⁰⁰ In the opinion of the Court, this was a violation of the Embera-Katío people's right to resolve its internal affairs autonomously. As stated above, article 330 of the Constitution does not require that an indigenous community be governed by a *cabildo*, but by the traditional form of authority accepted by the people in question. In the case of the Embera-Katíos of the Alto Sinú this would be the council of each village, whose authority must be recognized by the State authorities if the special political traditions of the Embera-Katío people are to be respected.¹⁰¹

This clearly shows that the Court looks to the protection of the rights and interests of the indigenous community or people as a whole, and will not accept reference to internal power disputes as an excuse for non-compliance with the state duty to protect the rights of indigenous peoples. The Court found the State to have contributed to the political crisis of the Embera-Katío people, and ordered it to respect its cultural and political characteristics in order to adequately protect the fundamental rights of the communities.

⁹⁹ Sentence T-652/98, section 7

¹⁰⁰ *ibid.* section 7 a)

¹⁰¹ *ibid.* section 7 b)

In case T-380/93, in which the Court elaborated on the indigenous community as a collective subject of rights, it also addressed the subject of illegitimate actions by community leaders. As stated above, certain interests of individual community members may contradict the interests of the community as a whole, and, as in all societies, the actions of indigenous leaders may in many cases jeopardize the well-being of the community. In the case under discussion, certain members of the *cabildo* of the Chajeradó community of the Embera-Katío people of the Medio Atrato region had, without the community's approval, given permission to the logging company MADARIEN to cut down forest on the territory of the *resguardo*. MADARIEN subsequently exploited around 4000 hectares of tropical rain forest on the *resguardo*, severely damaging the ecosystem on which the Embera-Katío people depend for their survival.¹⁰²

The community, with the aid of the NGO *Organización Indígena de Antioquia*, presented a *tutela* claiming that their collective rights to life, work, property and ethnic, cultural and economic integrity had been violated. The Constitutional Court held that the autonomy of indigenous peoples does not give the representatives of these communities unlimited powers with respect to disposing of the natural resources of their territories, but rather entails responsibilities to protect the best interests of the community. Article 330 of the Constitution specifically creates a duty of indigenous authorities to safeguard the preservation of the natural resources in their territories. In cases where indigenous leaders illegally or arbitrarily dispose of the lands or natural resources of the community, the Court applies the principle of *ultra vires*, meaning "beyond powers." It refers to conduct that exceeds the powers granted by the law, and thus can't be held as valid or legally binding.¹⁰³

The obligation to protect indigenous communities from harmful actions by community members as well as from external pressures is also made clear in the recognition of collective land rights of indigenous peoples, as the Constitution in articles 63 and 329 declares indigenous *resguardos* to be inalienable, imprescriptible and unseizable.¹⁰⁴ This means that they cannot be sold, given away, expropriated, confiscated or in any other manner be removed from the indigenous communities' ownership and control. These provisions legally prevent indigenous leaders from in any way relinquishing the

¹⁰² Sentence T-380/93, section II. 5

¹⁰³ *ibid.*, section II.13

¹⁰⁴ Tomei (1996), section 2, box 5

collective property of their communities, and as such invite the invocation of the principle of *ultra vires* if an attempt to do so should be made. This norm is not intended to diminish the autonomy of indigenous communities, but instead addresses concerns that conditions of seriously unequal bargaining power may lead to unfair transactions between indigenous peoples and others.¹⁰⁵ It is especially important in a context of armed conflict and widespread violence such as in Colombia, where forced displacement and armed coercion are common-place in the struggle for control over coveted territories.

3.3 The Meanings of Territory

Of the rights of indigenous communities guaranteed by the Constitution, the collective right to property of lands and territories is essential. As explained in chapter 2,¹⁰⁶ the Constitution explicitly recognizes the collective property relation of indigenous peoples to their lands, and attaches a set of special rights to be exercised within these territorial boundaries. The Constitutional Court has on repeated occasions taken the opportunity to elaborate on the meaning and content of this right, which is not only important in itself but also instrumental in protecting other, fundamental rights. In case T-188/93 of 1993, the Court stated that the collective right to property of their territories carries special importance for the cultural and spiritual values of indigenous peoples.¹⁰⁷ In doing so, it made explicit reference to ILO Convention no. 169, which in article 13.1 states the following:

In applying the provisions of this Part of the Convention governments shall respect the special importance for the cultures and spiritual values of the peoples concerned of their relationship with the lands or territories, or both as applicable, which they occupy or otherwise use, and in particular the collective aspects of this relationship.

The Court went on to explain that the special importance of the relationship between indigenous peoples and their territories owes not only to the fact that these contain the material basis for their subsistence, but also because they are integral elements in the cosmovision and religion of indigenous peoples. In addition, the Court referred to the preparatory works of the Constitutional Assembly to explain the meaning and importance of this right. It quoted indigenous representative Fransisco Rojas Birry, who stated that “*without rights to territory, fundamental rights to cultural identity and*

¹⁰⁵ Daes (2004), p. 18

¹⁰⁶ Chapter 2.4.2, *supra*

*autonomy would be mere formalities. [Indigenous peoples] need the territory they live in to survive and to develop their culture.”*¹⁰⁸

Based on considerations such as the above, the Court declared that the right of indigenous peoples to collective property of their territories is a fundamental right which, together with the constitutional principle of protection of ethnic and cultural diversity, implicitly encompasses a right to having their lands given legal status of *resguardos*.¹⁰⁹ This right includes the collective ownership of renewable and non-renewable natural resources in their territories,¹¹⁰ except sub-surface resources, which according to the Constitution belong to the State.¹¹¹

3.3.1 Anthropological perspectives on the meanings of territory

The Court has often cited cases T-188/93 and T-380/93 when considering new questions related to indigenous peoples' territories. But since those cases were written, the Court has had the opportunity to elaborate further on the various aspects of the importance of territory to indigenous peoples. In so doing, the magistrates of the Court have understood the necessity of interpreting the Constitution so as to also make sense in cultures radically different from the Western society within which its own legal tradition developed. From the Constitution's guarantee to recognize and protect the cultural diversity of the nation (art. 7), the Court derives its duty to fill its legal terms with meanings wide enough to encompass all the different cultures of Colombia. As a straight-forward interpretation of the letter of the law could in some cases lead to absurdities when transported from one cultural context to another, the Court's challenge has been to always maintain present the object and purpose of the laws in question. But even this may not be enough as such intercultural interpretations require a thorough understanding of the different cultures involved in any given case. It cannot seriously be expected of Court magistrates to possess the necessary degree of knowledge for the hermeneutical challenge of interpreting rights of all minority groups of Colombia within their particular cultural context. Recognizing both that cases involving fundamental rights of indigenous peoples cannot be adjudicated merely by interpretation of legal texts, and that the legalistic horizon of understanding of the judges would be inadequate

¹⁰⁷ Sentence T-188/93, section II.1

¹⁰⁸ Birry (1991); cited in Sentence T-188/93, section II.1 (My translation).

¹⁰⁹ Sentence T-188/93, section II.1

¹¹⁰ Sentence T-380/93, section II.12

¹¹¹ Political Constitution of Colombia (1991) art. 332

to provide the missing elements of comprehension, the Court has sought help from other disciplines to bolster its multicultural competence.¹¹² Both anthropology and moral political philosophy have become important elements in the Court's jurisprudence, as well as the use of *in situ* hearings, field investigations and expert opinions by anthropologists, biologists, geologists etc.¹¹³

The *Cristianía* case of 1992¹¹⁴ is illustrative in this respect. The State was carrying out construction work on a highway passing through the indigenous *resguardo* of Cristianía, without having consulted the indigenous community beforehand. The *resguardo* was located on a geological fault line and the construction work caused shifts in the landmass, changing the course of the *resguardo*'s river and severely damaging several buildings used for the community's agricultural practices. The Court sent its own representatives to investigate the local conditions, and requested expert opinions from anthropologists and geologists. To satisfactorily establish the physical facts of the case, geologists were consulted on the conditions of the land itself, its degree of instability etc., and how the road works could be said to have caused the damages. Both short- and potential long-term effects were studied, especially how the changed river course would affect the basic conditions for the economic practices of the community. Anthropologists were consulted on how the seriously negative impacts on the economic model of the community could violate the right to economic, social and cultural integrity and lead to the disintegration and eventual disappearance of the community. Based on these deliberations, the Court ordered the road works to be suspended until an environmental impact assessment had been carried out and it could be positively assured that no further damages could occur. In addition the community was to receive compensation payment for the damages.

The elements of this case have repeatedly been brought up in the Court's jurisprudence and were later reinforced in case T-380/93. At the moment what is important to emphasize is how the Court has taken upon itself the duty to engage in a dialogue with the indigenous peoples involved in the cases it is reviewing, and that anthropologists have been chosen as cultural translators in this enterprise. It can be useful to cite the Court's deliberations on this matter, taken from a case dealing with the conflict between

¹¹² Marino (2003) p. 78

¹¹³ *ibid.* p. 78

¹¹⁴ Sentence T-428/92

the right of indigenous peoples to cultural integrity and the individual human right of religious freedom:

(...) the Court considers that in cases where it is indispensable to weigh the importance of the right to ethnic and cultural difference against some other value, principle or constitutional right, it is necessary to enter into a kind of dialogue – direct or indirect- between the constitutional judge and the community or communities whose ethnic and cultural identity could be affected by the Court's sentence. The function of said activity pursues the widening of the judge's own cultural reality and of the constitutional horizon upon which the decision to be taken must be based, to include the ethos and the cosmovision of the human group or groups that claim their right to ethnic and cultural difference. In the Court's opinion, only through such a fusion can it be possible to reach a constitutional decision that truly recognizes and respects cultural difference and the idea of justice established in the Constitution (Preamble and article 1).¹¹⁵

In the case of territorial rights, their inherent connection to both the physical survival and the cultural integrity of indigenous peoples makes them impossible to discuss without trying to comprehend how these peoples understand the concept of territory. The Court has in many cases made use of anthropological ethnography to help explain this, such as in the recent case SU-383/03 of 2003, concerning ill effects of aerial fumigation of coca crops in the Colombian Amazon. This vast area, which makes up about a third of the national territory, is inhabited by around eighty different indigenous peoples,¹¹⁶ many of which are nomadic and/or have segments of their population living beyond the Colombian border.¹¹⁷ As part of Plan Colombia, the massive program funded by the USA to combat drug production and the armed insurgency, fields planted with coca and poppy have been sprayed from the air with glyphosate. Glyphosate is a chemical product around which there is a lot of controversy, as critics claim it is highly toxic and harmful both to the environment and to human beings, while proponents hold that it is a safe and efficient tool of drug eradication. The inaccuracy of aerial spraying has caused the glyphosate to affect much more than the coca fields of the drug traffickers. It has destroyed vegetation surrounding the coca crops, both food crops and natural rain forest, and in addition the chemicals have been spread by wind and water to areas far from the coca fields. Add to that the fact that coca is a sacred plant to many indigenous peoples, widely used in ceremonial acts and imbued with strong religious

¹¹⁵ Sentence SU-510/98, cited by Marino (2003) (My translation)

¹¹⁶ Sánchez (2004) p. 72

¹¹⁷ Sentence SU-383/03, section II.5.1

meaning. This is recognized by domestic legislation, and the practice of indigenous peoples of keeping small crops of coca is legally accepted. The plant is grown interspersed with other food crops, and aerial photos don't always permit distinguishing between indigenous and commercial coca crops. As a result many cultivation areas and even settlements of indigenous peoples were sprayed with glyphosate, leading to an outbreak of skin diseases and other health problems, including several unexplained deaths. In response to this, the NGO OPIACO (*Organización de los Pueblos Indígenas de la Amazonía Colombiana*) presented a *tutela* to seek the protection of a number of fundamental rights, demanding that the fumigations should be suspended. The *tutela* was rejected in lower instance courts, and the Constitutional Court chose the case for review. It concluded that the state authorities had violated the right to participation of the indigenous peoples of the Amazon, which is instrumental in protecting the right to cultural, social and economic integrity of indigenous peoples.¹¹⁸

The Court's treatment of the case involved a thorough investigation of the meaning of territory and natural resources to indigenous peoples of the Amazon region.

Referencing anthropological texts on this issue, the Court established that the concept of territories of indigenous peoples differs from that of majority society. Territory cannot be reduced to a question of occupation of a geographical area, or of appropriation of the forest and other natural resources. Rather, territory belongs as much to the realm of culture as to that of geography. The management of the natural environment is inextricably linked to social relations, and neither can be understood without reference to the symbolic aspects with which they are associated.¹¹⁹ In exploring this issue the Court cited several anthropologists, one of whom provided the following attempt to define the meaning of territory in indigenous cultures of the Amazon:

We find that territory is both a space and a process leading to the creation of a word of Law, understood as guidance, education. That space is not necessarily geographical, characterized by rocky outcrops, hills, streams or wells. Rather, that space is memory; it is the writing of the on-going process of creation; in the upbringing of the children, in social relations, in the solution of problems, in the healing of sickness.¹²⁰

¹¹⁸ *ibid.* section III.1. See chapter 3.5 on the right to participation.

¹¹⁹ Franky (2000); Cited in Sentence SU-383/03, section II.5.1.b

¹²⁰ Echeverri (2000); Cited in Sentence SU-383/03, section II.5.1.b (My translation)

In Sentence C-891 of 2002, investigating the constitutionality of a number of articles of the new Mining Code,¹²¹ the Court refers to a report by the Humboldt Institute on the subject of traditional knowledge of indigenous peoples. The report argues that the special relationship of indigenous peoples to their land is born from a comprehensive conception of the world which places human beings and the natural environment around them in the same dimension. In the view of the Humboldt Institute, the “cosmovision” of indigenous peoples, meaning their perception and understanding of the universe in all its material and spiritual aspects, is highly symbolized. Indigenous cultures often “socialize nature and naturalize social life”,¹²² meaning that phenomena in nature are explained by reference to social categories and vice versa. The relationship between indigenous peoples and the natural resources in their territories cannot be reduced to a simple relation of subject and object, it is impossible to separate a natural resource, such as a particular plant or mineral, from the symbolic position of that resource in the cosmovision of the people. These conceptions are expressed through mythology, religious beliefs and practices, and systems of internal regulation, including management of the environment, systems of production and exchange, and systems for preventing disease.¹²³ Or in the words of the Humboldt Institute: “*Territories and resources, as well as traditional knowledge, form a legacy which unites as a whole the past, present and future generations of indigenous peoples.*”¹²⁴

3.3.2 The Awas Tingni case: Anthropology in international jurisprudence

In the afore-mentioned case C-891/02, the Court leaned on international jurisprudence to show how the special relationship of indigenous peoples with their territories is becoming accepted in international law.

In 2001, the Inter-American Court of Human Rights (hereinafter the Inter-American Court) passed judgment in the case of the Mayagna (Sumo) Awas Tingni Community v. Nicaragua (Hereinafter the Awas Tingni case).¹²⁵ The Inter-American Court found that Nicaragua violated international law by failing to recognize and protect the traditional land tenure of the indigenous community of Awas Tingni, granting instead a concession to a Korean transnational corporation for large-scale logging on the ancestral lands of

¹²¹ Law 685 - Mining Code (2001)

¹²² Alexander von Humboldt Biological Resources Research Institute (2000), p 36. Cited in Sentence C-891/02, section VI.4.1, para. 13

¹²³ Alexander von Humboldt Biological Resources Research Institute (2000)

¹²⁴ *ibid.* p. 55 Cited in Sentence C-891/02, section VI.4.1 para.14 (My translation)

the community.¹²⁶ This is a landmark case in international law, as the first legally binding decision of an international court to protect indigenous peoples' collective property right to their lands and natural resources.

The current United Nations Special Rapporteur on the rights of indigenous peoples, the anthropologist and sociologist Rodolfo Stavenhagen, participated in the proceedings as an independent expert. Questioned about the relationship of indigenous peoples to land, Stavenhagen stated the following:

All anthropological, ethnological studies, all the documentation that indigenous populations themselves in recent years have had the opportunity to present to the public opinion, all the reports that governmental experts and international experts of different types of multilateral organizations (sic) show one fundamental thing: that the bond between indigenous peoples and the land is an essential bond that gives and maintains the cultural identity of these peoples. And here one must understand the land to mean not a simple instrument of agricultural or other production, not the land as a factor in production as economists tell us, but rather, the land as a part of the geographic space and the social space, of the symbolic space, of the religious space with which the history of indigenous peoples is connected and with which the current functioning of those same peoples is connected. [...] Also, the indigenous organizations themselves and the declarations of indigenous movements always tell us that the land does not belong to us, but rather, that we belong to the land. The bond is fundamental in that the fertility of the land, the fertility of the people, the physical health, the mental health, the social health of the indigenous peoples is connected with the concept of the land.¹²⁷

After citing these words of Stavenhagen, the Constitutional Court went on to cite the judgment of the Inter-American Court, which clearly endorsed Stavenhagen's and other consulted anthropologists' views on the importance of territory for indigenous peoples:

Indigenous groups, by the fact of their very existence, have the right to live freely in their own territory; the close ties of indigenous people with the land must be recognized and understood as the fundamental basis for their cultures, their spiritual life, their integrity, and their economic survival. For indigenous communities, relations to the land are not merely a matter of possession and production but a material and spiritual element which they must fully enjoy, even to preserve their cultural legacy and transmit it to future generations.¹²⁸

¹²⁵ Mayagna (Sumo) Awas Tingni Community vs. Nicaragua (2001)

¹²⁶ Anaya (2005)

¹²⁷ Case of the Mayagna (Sumo) Community of Awas Tingni: Transcript of the Public Hearing on the Merits (2002), pp. 176-177. Cited in Sentence C-891/02, section VI.4.1 para. 13

¹²⁸ Mayagna (Sumo) Awas Tingni Community vs. Nicaragua (2001), para. 149. Cited in Sentence C-891/02, section VI.4.1 para. 13

The Inter-American Court found a violation of articles 21 (right to property) and 25 (right to judicial protection) of the American Convention on Human Rights (ACHR).

The Court argued further that:

International human rights treaties are live instruments whose interpretation must adapt to the evolution of the times and, specifically, to current living conditions.¹²⁹ (...) Read in conjunction with article 1(1) of the ACHR, which prohibits discrimination of any kind in the enjoyment and exercise of the rights of the Convention, an evolutionary interpretation of the right to property as included in article 21 must include the concept of collective property as practiced and understood by indigenous peoples.¹³⁰

The Constitutional Court of Colombia had long employed a similar reading of the content of the collective right to land of indigenous peoples, recognized both by the Constitution and ILO Convention No. 169, article 14.1:

The rights of ownership and possession of the peoples concerned over the lands which they traditionally occupy shall be recognized. In addition, measures shall be taken in appropriate cases to safeguard the right of the peoples concerned to use lands not exclusively occupied by them, but to which they have traditionally had access for their subsistence and traditional activities. Particular attention shall be paid to the situation of the nomadic peoples and shifting cultivators in this respect.¹³¹

In the *Awas Tingni* case, the judges of the Constitutional Court of Colombia found support for its interpretation of indigenous peoples' rights from such an important authority of international law as the Inter-American Court of Human Rights. In fact, the effort made by the Inter-American Court to make sense of international human rights law in the frame of reference of indigenous peoples is similar to the one made by the Constitutional Court. Both courts have based their interpretations on anthropological literature and testimony of indigenous representatives in order to comprehend the meaning of territory to indigenous peoples. The main difference lies in the legal sources the courts have used to establish the right of indigenous peoples to collective property of lands and territories.

Interestingly enough, it seems that the Constitutional Court of Colombia has had stronger legal backing than the Inter-American Court when it comes to adjudicating indigenous peoples' rights. Whereas the Inter-American Court based its judgment in the *Awas Tingni* case solely on the ACHR and its own jurisprudence,¹³² the Constitutional

¹²⁹ Mayagna (Sumo) *Awas Tingni* Community vs. Nicaragua (2001) para. 146

¹³⁰ *ibid.* para. 148

¹³¹ ILO Convention 169 (1989) art. 14.1. Cited *i.e.* in Sentence T-342/94, para. 3.5.

¹³² Nicaragua has not ratified ILO Convention no. 169

Court finds its sources in the constitutional corpus encompassing the Constitution, all international human rights treaties ratified by Colombia and the jurisprudence of relevant international human rights courts and treaty bodies. In the majority of cases, the Constitutional Court refers only to ILO Convention No. 169 in addition to the Constitution itself, as this is the most relevant of the international human rights treaties and the one which spells out the content of indigenous peoples' rights in the clearest manner. However, if the Court should wish to include more legal sources in its reasoning on the land rights of indigenous peoples, both the ACHR and the Inter-American Court's judgment in the *Awas Tingni* case is part of the constitutional corpus. That is also the case with the ICCPR, which the Court referred to in Sentence C-891/02 directly after citing the *Awas Tingni* case. The Court held that the opinions set forth by Stavenhagen and the judges of the Inter-American Court clearly showed that the right of indigenous peoples to enjoy their own culture, to profess and practice their religion and to use their own language, as stated in article 27 of ICCPR, must be understood as including the right to possess their own territory, on which these peoples may preserve their cultural heritage and transmit it to future generations.¹³³

3.4 Fundamental rights connected to lands and natural resources

The investigation into the meaning of territory provides an example of how the Constitutional Court has made use of anthropological research to better understand the concepts, cultural practices and fundamental needs of indigenous peoples. Beyond the hermeneutic exercise of building inter-cultural comprehension, the challenge for the Court has been to link these special needs and conditions of indigenous peoples to rights set down in the Constitution and the relevant international human rights treaties. With respect to the importance of lands and natural resources to indigenous peoples, the Court has pursued two interconnected lines of argument: On the one hand, territories of indigenous peoples are fundamentally important for protecting these peoples' right to cultural, social and economic integrity. On the other, territories form the material basis for the survival of indigenous peoples, both as individuals and groups. These two issues are, because of their very nature, difficult to separate and throughout the Court's jurisprudence they appear as inherently interrelated. In the following I will nevertheless

¹³³ Sentence C-891/02, section VI.4.1 para. 14

make an attempt to treat them separately in order to highlight the different legal consequences that may be derived from them.

3.4.1 The right to cultural, social and economic integrity

Article 330 of the Constitution declares that exploitation of natural resources in indigenous territories shall be carried out without harm to the cultural, social and economic integrity of indigenous communities.¹³⁴ The Constitution doesn't define such integrity, but the Constitutional Court, in case SU-039/97, stated that natural resource extraction in indigenous territories involves a conflict of interests between the economic development of the country and the protection of the cultural, social and economic integrity of indigenous peoples, which it defined as: *"the basic elements that constitute their cohesion as a social group and which, therefore, form the substrate of their subsistence."*¹³⁵

The Court has made it clear that this concept is connected to the State duty to respect and protect cultural diversity, as stated in article 7 of the Constitution.¹³⁶ References from international human rights law are also helpful to understanding the concept. Article 27 of ICCPR protects the right of ethnic, religious and linguistic minorities to enjoy their own culture, to profess and practice their religion and to use their own language, in community with other members of their group.¹³⁷

ILO Convention 169 declares that signatory States have the duty to promote the full realization of the social, economic and cultural rights of indigenous peoples with respect for their social and cultural identity, their customs and traditions and their institutions.¹³⁸ Further, that the social, cultural, religious and spiritual values and practices of these peoples shall be recognized and protected, with due account to the nature of the problems which face them both as groups and as individuals. Finally, that the integrity of the values, practices and institutions of these peoples shall be respected.¹³⁹ Together, these articles support an interpretation of cultural, social and economic integrity as related to questions of identity and cultural diversity. Indigenous peoples have the right to maintain and develop their distinct identity, and this identity is exercised through their cosmovision, customs, religious beliefs, languages, political and

¹³⁴ Political Constitution of Colombia (1991), art. 330

¹³⁵ Sentence SU-039/97, section II.3.2 (My translation)

¹³⁶ Sentence T-380/93, section II.7-8

¹³⁷ ICCPR (1966), art. 27

¹³⁸ ILO Convention 169 (1989), art. 2 (b)

social organization, economic practices, in short; their entire way of life. States are obliged to recognize and protect this diversity of cultures, and to take special measures to secure indigenous peoples equal enjoyment of rights with the rest of the population.¹⁴⁰ This is echoed in more general terms in the Constitution of Colombia, which prohibits any form of discrimination and declares that the State has a special duty to make this equality of rights effective, taking special measures to protect marginalized groups.¹⁴¹ This requires implementing mechanisms and instruments which are appropriate to the cultural, social and economic characteristics of indigenous peoples, while at the same time being compatible with the political and legal organization of the State. The recognition of indigenous peoples' strong emphasis on the collective aspects of life and the importance of the community, and taking measures to guarantee the viability of this form of life is a first step to protecting their cultural, social and economic integrity.

In Colombia, collective land tenure is a central mechanism of protection, as it is meant to secure indigenous peoples the possibility of maintaining their traditional form of life and the economic practices which ensure their subsistence.

The Constitutional Court has commented on the difference of economic models of indigenous peoples and the majority society, with relation to the use of natural resources. In the aforementioned case T-380/93, the Court declared that the relationship of the economic system of capitalism to the natural environment is one of domination and exploitation, which results in great tension between the search for profit and the need for sustainable management of natural resources.¹⁴² Indigenous peoples often depend on fragile ecosystems for their survival, and their economic practices reflect this need for a balanced and sustainable harvesting of natural resources. Indiscriminate exploitation destroys the primary resources necessary for the economy of subsistence which many indigenous peoples engage in, especially in tropical lowland regions, and which is symbolically connected to all aspects of their life.¹⁴³

The Constitutional Court argued that the constitutional principle of cultural diversity demands the recognition and protection of different economic models, including the subsistence economy of indigenous peoples. Since this type of economy is extremely

¹³⁹ *ibid.* art. 5(a) and (b)

¹⁴⁰ *ibid.* art. 2(a)

¹⁴¹ Political Constitution of Colombia (1991), art. 13

¹⁴² Sentence T-380/93, section II.7

¹⁴³ *ibid.*

vulnerable to activities that damage the equilibrium of the ecosystems it depends on, the Constitution establishes a limit to natural resource extraction on indigenous territories: it mustn't in any way harm their cultural, social and economic integrity.¹⁴⁴

3.4.2 The collective right to life and the freedom from forced disappearance

The Constitutional Court stated in case T-380/93 that among the fundamental rights of indigenous peoples is the right to subsistence, derived directly from the right to life as consecrated in article 11 of the Constitution.¹⁴⁵ Having established that destroying the natural environment within which indigenous peoples carry out their economic practices is a violation of their cultural, social and economic integrity, as it makes impossible the continued exercise of their group identity, the Court stated the following:

The cultures of indigenous peoples correspond to a way of life that materializes in a special mode of being and acting in the world, constituted of values, beliefs, attitudes and knowledge. If this mode of being should be eliminated or suppressed, as could be the result of severe degradation of their environment, it would lead to destabilization and the eventual extinction of their entire way of life. The prohibition of all forms of forced disappearance (Constitution article 12) is also applicable to the indigenous communities, who have the fundamental right to ethnic, cultural and social integrity.¹⁴⁶

Keeping in mind that case T-380/93 dealt with a case of large-scale illegal logging on indigenous land, the public authority whose legal responsibility it was to protect the natural resources and guarantee the reparation of any ecological damage, CODECHOCÓ, was condemned for grave negligence in its duty. The Court argued that CODECHOCÓ's omission of its duty amounted to a serious threat to the right to life and the freedom from forced disappearance of the Embera-Katío community of Chajeradó:

The close relation between a balanced ecosystem and the survival of the indigenous communities that inhabit the tropical rain forests transforms the factors of environmental damage caused by deforestation, sedimentation and the contamination of rivers – in principle cases of violation of collective rights and interests and therefore meant to be addressed through the exercise of *acción popular* – and turns them into a potential danger to the life and the cultural, social and economic integrity of minority groups that, given their ethnic and cultural diversity, have the right to special protection from the State (Constitution art. 13). The State's inaction in the face of serious damage to the environment of an

¹⁴⁴ Political Constitution of Colombia (1991). art. 330

¹⁴⁵ Sentence T-380/93, section II.8

¹⁴⁶ *ibid.* (My translation)

ethnic group may, given the biological interdependence of the ecosystem, contribute passively to the perpetration of an ethnocide, consisting in the forced disappearance of an ethnic group (Constitution art. 12) as a result of the destruction of their conditions of life and their system of beliefs.¹⁴⁷

These are dramatic affirmations of the Court. Two terms are introduced which are not often brought into play with relation to environmental destruction: ethnocide and forced disappearance. In order to comprehend the potential consequences of the Court's finding, it will be necessary to investigate the possible interpretations of those terms in international human rights law and to see whether such interpretations are applicable in this case. We must study attempts to define the crimes of ethnocide and forced disappearance, and establish their status in international human rights law. Then we will see whether the Constitutional Court bases its ruling on accepted international doctrine, or if it goes beyond mainstream doctrine and creates a more robust defence of indigenous peoples' rights.

3.4.2.1 Ethnocide

The term "ethnocide" does not appear in any international human rights treaty currently in force; but has rather been considered by legal scholars as a sub-type of "genocide". However, the concept has been used and developed by social scientists when referring to actions of majority groups that have such devastating effects on minority cultures that they drive them to extinction.¹⁴⁸ In order to compare the two terms, it is necessary to first establish the meaning of the term "genocide" and then investigate whether "ethnocide" offers any added value. I will first outline the main elements of the interpretation of "genocide" as it appears in international law, and discuss whether this interpretation is applicable to the situation of the Embera-Katío people of case T-380/93. I shall then comment on the meaning given to "ethnocide" in the Draft United

¹⁴⁷ ibid. section II.18 (My translation). Unfortunately, the case law of the Constitutional Court isn't entirely consistent with regard to the applicability of the *tutela* mechanism in situations of collective rights directly connected to fundamental rights. In two cases of grave threats to the health of members of indigenous communities caused by environmental pollution from military activities, the Court came to opposite conclusions:

In *tutela* T-405/93 the Court held that while the right to a healthy environment was a collective right and as such to be protected through the *acción popular*, in the present case the threat to life and health of the members of an indigenous community, proven by diseases coming from drinking contaminated water, brought fundamental rights into play and therefore the applicability of *tutela* action. In the aforementioned case SU-383/03, concerning the outbreak of skin diseases and other illnesses among the indigenous population in areas affected by aerial fumigation of drug crops, the Court ruled that *acción popular* and not *tutela* was the correct mechanism for seeking protection of the collective rights to health and security. See Sentence T-405/93, section III.4 and Sentence SU-383/03, section II.6

¹⁴⁸ Roos (2002) p. 14

Nations Declaration on Indigenous Peoples, and its relation to the Constitutional Court's interpretation of the term.

According to Smith, the word "genocide" is a modern term for an ancient crime,¹⁴⁹ and includes both the physical and the cultural extermination of a group. History is full of examples. Indigenous peoples in the Americas were decimated in the centuries following the European invasion of their continent. Diseases, slavery and outright slaughter of men, women and children were common elements in the subjugation of the native inhabitants of the so-called New World.¹⁵⁰ But the term "genocide" was coined later, to describe the systematic mass-murder of Jews during World War II.

The first legal definition of the term appeared in 1946 in General Assembly Resolution no. 96 (I): "*Genocide is the denial of the right of existence of entire human groups*".¹⁵¹

The existence of a discernible group is essential, but the characteristics of the group may vary. The definition of genocide which is most widely accepted and considered authoritative is the one adopted by the United Nations in the Convention on the Prevention and Punishment of the Crime of Genocide, (hereinafter "the Genocide Convention"). Article 2 reads as follows:

In the present Convention, genocide means any of the following acts committed with the intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such: a) Killing members of the group; b) Causing serious bodily or mental harm to members of the group; c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; d) Imposing measures intended to prevent births within the group, e) Forcibly transferring children of the group to another group.¹⁵²

The group element is very clear in this definition and several different groups are listed, one of them being "ethnical". A straightforward interpretation of "ethnocide" would be that it is a specification of what kind of group is being attacked, and as such it may sometimes provide for greater clarity of argument but is in reality quite superfluous as a legal term. Article 6 of the Rome Statute of the International criminal Court adopts the same definition word for word.¹⁵³ Genocide is now widely accepted as a peremptory norm of international law, a prime example of *jus cogens*.¹⁵⁴

¹⁴⁹ Smith (2003) p. 213

¹⁵⁰ Anaya (2004) p. 3

¹⁵¹ General Assembly Resolution 96 (I) (1946). Cited by Smith (2003) p. 214

¹⁵² Genocide Convention (1948) art. II

¹⁵³ Rome Statute of the International Criminal Court (1998)

¹⁵⁴ Smith (2003) p. 216

The essence of genocide lies not in the actual destruction of a group but in the intent to destroy it as such, in other words the *mens rea* of the crime.¹⁵⁵ To determine whether destruction of an indigenous people's natural habitat and basis for subsistence could amount to genocide, the critical element is whether the action of environmental destruction was carried out with the intent to extinguish the group living there. In the case of industrial logging on the land of the Embera-Katío people of Chajeradó,¹⁵⁶ the actual perpetrator was a private logging company, motivated by profit and probably indifferent to the fate of the Embera-Katíos. The Constitutional Court found that it was the failure of the State to protect the Embera-Katíos that could passively lead to ethnocide, given the indigenous community's dependence on the natural environment for its subsistence. The actual damage caused would be grave enough to fulfil the requirement of paragraph c) of article 2 of the Genocide Convention, of inflicting conditions of life that could bring about the destruction of the group. But the Court did not find genocidal intent on the part of the State authority, only negligence of its duty to protect and to repair the environmental damages. *Mens rea*, the "intent to destroy", is extremely difficult to prove, making it very unlikely that arguments of genocide can prosper in cases of destruction caused by natural resource exploitation or development projects on the lands of indigenous peoples. This is unsatisfactory from a moral point of view, as one cannot help asking what difference *mens rea* makes to the victims. If their entire culture is annihilated, would it be any less serious if it is due to a side-effect of economic development rather than an openly declared ethnic hatred? Indifference to the plight of indigenous peoples as their cultures are destroyed for economic profit is just as contrary to the spirit of the Universal Declaration of Human Rights as a hateful intent to exterminate them. This complete disregard for the inherent human dignity of indigenous peoples and the cultural wealth of which they are custodians brings to mind the famous words of Elie Wiesel: "*The opposite of love is not hate, it is indifference*". During the past few decades a more rights-based approach to the question of protection of indigenous cultures has progressed. This has been especially obvious in the activities of the United Nations and the Organization of American States (OAS), which are both

¹⁵⁵ Roos (2002) p. 2

¹⁵⁶ Sentence T-380/93

trying to create declarations on the rights of indigenous peoples.¹⁵⁷ An explicit reference to ethnocide appears in article 7 of the Draft United Nations Declaration:

Indigenous peoples have the collective and individual right not to be subjected to ethnocide and cultural genocide, including prevention of and redress for: a) Any action which has the aim or effect of depriving them of their integrity as distinct peoples, or of their cultural values or ethnic identities; b) Any action which has the aim or effect of dispossessing them of their lands, territories or resources; c) Any form of population transfer which has the aim or effect of violating or undermining any of their rights; d) Any form of assimilation or integration by other cultures or ways of life imposed on them by legislative, administrative or other measures; e) Any form of propaganda directed against them.¹⁵⁸

This definition is very different from the standard definition of “genocide”, although there is direct reference to “cultural genocide”. The problem of intent is solved by introducing the words “aim or effect”. That alone would strengthen the protection of indigenous peoples immensely. A second difference is that there is no reference to physical destruction of the group. Instead, the emphasis is on the importance of the distinct cultures of indigenous peoples, and on the assertion that their continued existence as groups depends on their right to exercise their distinct identity.

The list of actions is made up of examples of attacks against the cultural integrity of indigenous peoples, and is both concrete yet wide enough to cover possible new forms of aggression. This definition is much better suited to cover the wide range of ways in which indigenous peoples are being forced or pressured to abandon their distinct identity and assimilate into the prevailing society.

The explicit reference to lands and territories of indigenous peoples is another example of how the importance of territory is becoming increasingly understood internationally, and how almost every aspect of the struggle for indigenous peoples’ rights relates to the question of territory.

It is likely that the Constitutional Court’s use of “ethnocide” in case T-380/93 resembles the Draft Declaration’s interpretation of the term,¹⁵⁹ which emphasizes the importance of self-determination and cultural integrity. However, it might be argued that the Court takes it a step further by making explicit reference to the right to life and the freedom

¹⁵⁷ Although neither the 1994 Draft United Nations Declaration nor the 1997 OAS Declaration Project have yet been concluded due to disagreements on key points, the draft texts are still important indications of the direction in which international law on indigenous peoples’ rights is heading.

¹⁵⁸ Draft United Nations Declaration on the Rights of Indigenous Peoples (1994), art. 7

from forced disappearance. Taking into account the Court's case law on cultural, social and economic integrity, the importance of the community, the right to special protection of disadvantaged groups, the nexus of indigenous peoples to the environment and its effects on their right to life, it is evident that the Court links cultural and physical destruction. If an indigenous community is deprived of the necessary conditions for its continued existence as a distinct, cultural group, it amounts to a violation of its right to life and freedom from forced disappearance.

In case T-380/93, even if no member of the Embera-Katio community should die, the destruction of the community's living environment would be an ethnocide if it led to the disintegration of the community as such. The central point is that it is the right to life of the *community* which is violated, not necessarily that of its individual members.

3.4.2.2 Forced Disappearance

The crime of forced disappearance became notorious during the dictatorships of Central and South America in the 1970s and 80s. It was first defined in the United Nations Declaration on the Protection of all Persons from Enforced Disappearance in 1992, and applies to the case of persons being detained or abducted by government officials or with the acquiescence of these, followed by a refusal of the authorities to acknowledge the detention and disclose the fate or whereabouts of the person.¹⁶⁰ The practice of forced disappearance has been wide-spread in Colombia for the past decades, in the context of the on-going internal, armed conflict. Article 12 of the Constitution expressly prohibits the practice, but doesn't provide a definition. It wasn't until 2000 that Colombia enacted a penal law defining the crimes of forced disappearance, genocide, forced displacement and torture.¹⁶¹ The adopted definition of forced disappearance includes all the elements of the definition of the United Nations Declaration.¹⁶² In 2005 Colombia acceded to the Inter-American Convention on the Forced Disappearance of Persons, which employs a similar definition.¹⁶³ The Constitutional Court does not make reference to any definition of forced disappearance in case T-380/93, only to the

¹⁵⁹ I say "likely", because the Court has never explicitly referred to this definition or any other. It is worth noting that Sentence T-380/93 appeared the year before the publication of the Draft United Nations Declaration.

¹⁶⁰ Declaration on the Protection of all Persons from Enforced Disappearance (1992), Preamble

¹⁶¹ Law 589 (2000)

¹⁶² Report of the Working Group on Enforced or Involuntary Disappearances - Mission to Colombia (2006) p. 10

¹⁶³ Inter-American Convention on the Forced Disappearance of Persons (1994) art. II

constitutional prohibition of the practice. None of the elements of the definition from the United Nations Declaration apply in case T-380/93, yet as at the time there didn't exist any definition of the practice either in the laws of the country or the constitutional corpus, the Court was free to interpret the Constitution's reference to forced disappearance as it saw fit.¹⁶⁴ In declaring that the freedom from forced disappearance also applies to indigenous communities,¹⁶⁵ the Court chose to employ a straightforward interpretation based on the facts of the case: An entire indigenous community was in danger of disintegrating and ceasing to exist due to actions by a private actor which were seemingly tolerated by State authorities. The community, in itself a collective subject of fundamental rights, was threatened with forced disappearance, despite no individual member of the community being "disappeared".

3.4.2.3 Concluding remarks on ethnocide and forced disappearance

Taking into account the Court's view on the importance of the community to indigenous peoples and the unequivocal opinion that indigenous communities are holders of fundamental rights, the references in case T-380/93 to the right to life (from which the right to subsistence is derived) and the freedom from forced disappearance indicate that the Court considers the effects of an action as more important than its ultimate aim. While the "specific intent" requirement of genocide makes it very difficult to prove, the Court's use of the term "ethnocide" avoids such snags. In the Court's interpretation, "ethnocide" seems to mean physical and/or cultural destruction of a human group, materialized through the forced disappearance of that group. In this way the Constitutional Court keeps in mind the object and purpose of the human rights to life and cultural integrity, and thus avoids the moral dilemma of having to absolve a guilty party of ethnocide just because specific intent can't be proved. As such the Court sets a positive example by not limiting itself to restrictive analysis of legal text.

Although the Constitutional Court has not always been entirely consistent in its jurisprudence,¹⁶⁶ the fact that case T-380/93 is so often cited by the Court is an indication that its conclusions in that case are still considered valid.¹⁶⁷ Of special note is the previously discussed case T-652/98, in which the Court expressly applied its rulings

¹⁶⁴ It is possible, however unlikely, that the Court magistrates did not know the content of the Declaration on Enforced Disappearance, which was published some nine months prior to Sentence T-380/93. In any case, there is no reference to it in said sentence.

¹⁶⁵ Sentence T-380/93, section II.8. See chapter 3.4.2, *supra*

¹⁶⁶ See note 147, *supra*

from case T-380/93 to the facts of the case and elaborated on them in detail.¹⁶⁸ In its analysis the Court undertook a thorough investigation of how the economic practices of the indigenous communities in question were affected as a consequence of their territory being flooded. It concluded that the impossibility of continuing their traditional economic practices entailed a grave threat to the cultural, social and economic integrity of the communities, as well as to their right to subsistence and thus life.¹⁶⁹

3.5 The right to consultation and participation

In one of the most famous cases of the Constitutional Court to date, SU-039/97, the Court defined the aim and scope of the right to prior consultation in cases of natural resource extraction. The case dealt with a complaint raised by the Ombudsman's office on behalf of the U'wa people, whose ancestral lands are located in western Colombia. The area is rich in oil, and in 1995 the Ministry of Environment granted a license to the Occidental Petroleum Company (OXY) for seismic explorations in an area including the *resguardo* of the U'wa. The U'wa communities protested fiercely and captured the attention of international society when they threatened to commit collective suicide if their ancestral lands were violated by the petroleum company.¹⁷⁰ In order to establish whether the Ministry of Environment and OXY had fulfilled or not their constitutional obligation to carry out a process of prior consultation with the U'was, the Constitutional Court analyzed the scope and content of the right in question as it appears in the constitutional corpus. Reiterating that the right of indigenous peoples to cultural, social and economic integrity is a fundamental right because of its connection to their subsistence as human groups, the Court declared that according to article 330 of the Constitution this subsistence shall be protected through the participation of the indigenous communities in decisions concerning natural resource extraction in their territories.¹⁷¹ The right to participation is set down in article 40.2 of the Constitution. In the case of indigenous peoples, the Court found that the right to participation, by way of

¹⁶⁷ See *i.e.* Sentence SU-039/97; Sentence T-652/98; Sentence SU-383/03

¹⁶⁸ Case T-652/98 dealt with a dam being built on the territory of the Embera-Katío people of Alto Sinú. See chapter 3.2 *supra*, and chapter 4.1.1 *infra*

¹⁶⁹ Sentence T-652/98, section 5 a)

¹⁷⁰ The case has been widely covered both by activist networks and academic writers. For the former, see *i.e.* Colombia: Ecopetrol's Siriri Oil Project.

For the latter, see *i.e.* Culler (2001), Wagner (2001) and especially Rodríguez-Garavito (2005).

¹⁷¹ Sentence SU-039/97, section II.3.2

the mechanism of prior consultation, acquires the status of fundamental right because it is instrumental to preserving their cultural, social and economic integrity.

This fundamental right to participation is reinforced by ILO Convention 169, which gives great attention to the question of participation.¹⁷² The Court cited articles 5, 6, 7.1 and 15 of the ILO Convention as authoritative sources for the interpretation of the right to participation in Colombian law. Article 5 demands the protection of the social, cultural, religious and spiritual values and practices of indigenous peoples and the respect of their integrity. Article 7.1 approaches the thorny subject of self-determination, recognizing indigenous peoples' right to "decide their own priorities for the process of development" and "to exercise control, to the extent possible, over their own economic, social and cultural development". Articles 6 and 15 require that States consult with indigenous peoples and ensure their informed participation when considering administrative and legislative measures that will affect them directly, especially with regard to the use, management and conservation of the natural resources in their territories. Article 6 sets down the general principle that consultation must be carried out in good faith, in a form appropriate to the circumstances and with the objective of achieving consent. Basing itself on these articles, the Court argued that a process of consultation with an indigenous community requires a relation of communication and understanding between the community and the authorities, characterized by mutual respect and good faith.¹⁷³ The Court proposed a check-list of three elements which must be present for a valid consultation process to have taken place:

- a) That the community obtains full knowledge of the projects that aim to explore or exploit the natural resources in the territories that they use or that belong to them, as well as the mechanisms, procedures and activities necessary for their implementation;
- b) That the community understands and is conscious of how the implementation of the projects in question could lead to negative effects on the elements that compose the basis for their social, cultural, economic and political cohesion and, consequently, the foundation for their subsistence as a human group with singular characteristics;
- c) That the community is given the opportunity to freely and without external interference, through the meeting of its members or representatives, conscientiously evaluate the advantages and disadvantages of the project to the community and its members. The point

¹⁷² *ibid.* section II.3.3

¹⁷³ *ibid.*

of view of the community in relation to the viability of the project and the defence of their rights should be heard. The aim of the process should be that the indigenous community should enjoy an active and effective participation in the decision-making process, and that the decision finally taken by the authority should, to the extent possible, be agreed upon with the indigenous community.¹⁷⁴

From this analysis it follows that merely informing an indigenous community of plans to explore the natural resources in its territory, as happened in the U'wa case, is far from conforming to the requirements of a proper consultation process.¹⁷⁵ The fundamental importance of the right to participation demands that a consultation process be serious and carried out in good faith, and that the indigenous community gets the chance to contemplate the consequences and express their approval or rejection of the project. This implies that the information must be presented in a language and manner which the members of the indigenous community can understand, especially important when considering the high level of illiteracy of many isolated indigenous peoples. Another implication is that time limits must be sufficiently ample to allow information to reach all members of an affected community, taking into account the settlement patterns of indigenous peoples, often inhabiting remote areas of difficult access. In cases where no agreement is reached despite a good faith effort fulfilling the requirements set down in the check-list, it is the opinion of the Court that the public authority has the final responsibility to make a decision. Such a decision must, however, be objective, reasonable and proportionate to the constitutional end of protecting the social, cultural and economic integrity of the indigenous community.¹⁷⁶

The Court returns to the point of final disagreement in case C-891/02, where it cites ILO guidelines for application of Convention 169: “*Like other elements of the national population of any country, indigenous and tribal peoples do not have the right to veto development plans that may affect the whole country.*”¹⁷⁷ The subject of veto is a continuing point of contention, as indigenous representatives have complained that the lack of veto power will reduce consultation to a mere formality, leaving governments to do what they want anyway. However, the ILO guidelines explain that states have the duty to ensure actual consultation with indigenous peoples, including giving the indigenous communities a real opportunity to influence decisions, and providing an

¹⁷⁴ ibid. (My translation)

¹⁷⁵ ibid.

¹⁷⁶ ibid.

¹⁷⁷ Tomei (1996) section 1. Cited in Sentence C-891/02, section VI.4.2, para. 17

enabling environment and conditions to permit the meaningful participation of these peoples.¹⁷⁸

Other international sources declare that indigenous peoples have a *right* to “free, prior and informed consent”, not merely that consultations should have the *aim* of achieving consent. CERD General Recommendation 23 on indigenous peoples, published the same year as case SU-039/97, calls upon States to “*ensure that members of indigenous peoples have rights in respect of effective participation of public life and that no decisions directly relating to their rights and interests are taken without their informed consent.*”¹⁷⁹ The Committee on Economic, Social and Cultural Rights has repeatedly emphasized the need to obtain the consent of indigenous peoples in relation to resource exploitation.¹⁸⁰ The Awas Tingni case of the Inter-American Court and several reports by the Inter-American Commission on Human Rights also highlight the link between consultation resulting in full and informed consent, and protection of indigenous property rights.¹⁸¹ On the other hand, the World Bank Group rejects adopting free, prior and informed consent as operational policy, “where this would represent a veto on development”.¹⁸² The Constitutional Court looks only to the ILO Convention in this matter, and does not require that indigenous peoples give their consent in a given case, as long as the consultation process has been adequate according to the check-list outlined above. However, if the Colombian State should authorize a project against the express wishes of the affected indigenous community, the decision to do so must fulfil the requirements of being objective, reasonable and proportionate, as well as not in any way endangering the fundamental rights of the indigenous community to subsistence and cultural integrity.

The “participation check-list” is a useful tool for evaluating the adequacy of consultation processes, and it has been invoked in several cases where the authorities and indigenous communities dispute whether such processes have been properly carried out. Such was the case in sentence C-169/01 of 2001, a review of the constitutionality of a new law regulating the special participation of minority ethnic groups in Congress. The NGO ONIC protested that the enactment of the new law was unconstitutional in procedure as indigenous organizations had not been consulted on its content. The Court

¹⁷⁸ Tomei (1996), section 1

¹⁷⁹ CERD General Recommendation 23 (1997), art. 4.d

¹⁸⁰ Motoc (2005) p. 5

¹⁸¹ *ibid.* p. 6

¹⁸² MacKay (2004) p.11

in this case applied an uncharacteristically restrictive interpretation, holding that the state duty to consult indigenous peoples only applied for cases of natural resource extraction. The Court reasoned that as there is no explicit reference to consultation rights either in the Constitution or the laws except for the Constitution's article 330 on natural resources, the right to consultation does not cover legislative or other non-specified measures even though they affect indigenous peoples directly. The decision is curious as this interpretation of consultation rights is not only restrictive, but appears to be in direct contradiction of article 6 of the ILO Convention and its explicit reference to "legislative and administrative measures". The Court recognized its obligation under article 6, but then referred to article 34 of the same Convention to give the State a margin of discretion:¹⁸³

The nature and scope of the measures to be taken to give effect to this Convention shall be determined in a flexible manner, having regard to the conditions characteristic of each country.¹⁸⁴

The Court's conclusion was that as long as the effective participation of indigenous peoples in law-making is guaranteed by the presence of indigenous representatives in Congress, there is no obligation to carry out a special consultation process. However, the Court warned that any misuse of article 34 of the ILO Convention could lead to a violation of article 31.1 of the Vienna Convention on the Law of Treaties¹⁸⁵, stating that treaties must be interpreted in good faith, in accordance with the ordinary meaning of the terms employed and in light of their object and purpose.¹⁸⁶ Despite this finding, in the more recent case C-891/02 of 2002 the Court did see fit to evaluate the characteristics of the consultation process that was carried out in relation with the creation of the new Mining Code, by definition a legislative measure.¹⁸⁷ As previously mentioned, the Court found in case SU-383/03 that the right to participation had been violated with relation to the program of aerial glyphosate spraying of coca crops in the Amazon region.¹⁸⁸ In that case the Court clarified that the right to participation is not restricted to situations of natural resource extraction, but is valid for all measures directly affecting indigenous peoples, in accordance with article 6 of the ILO

¹⁸³ Sentence C-169/01, section V.2.3

¹⁸⁴ ILO Convention 169 (1989) art. 34

¹⁸⁵ Vienna Convention on the Law of Treaties (1969) art. 31.1

¹⁸⁶ Sentence C-169/01, section V.2.3

¹⁸⁷ Botero (2004), p. 370

¹⁸⁸ See pp. 29-30, *supra*

Convention.¹⁸⁹ Because of the special importance of the coca plant in the indigenous cultures of the Amazon region and the interconnectedness of indigenous peoples with their natural environment, a consultation process including the appropriate form of implementation of the drug eradication programme was in the Court's opinion the only way of guaranteeing their fundamental right to cultural, social and economic integrity. In this case, the Court didn't find the margin of discretion of article 34 of the ILO Convention to exempt the authorities from carrying out a direct consultation process with the affected peoples.

3.5.1 Concluding remarks on the right to consultation

In synthesis it can be said that the Constitutional Court upholds the requirements of the ILO Convention, and has contributed to concretizing the content of the Convention in the Colombian context, by clearly defining the aim and scope of the right to participation. It is not surprising, given the current state of international law and especially the legal instruments included in the constitutional corpus, that the Court doesn't acknowledge a right to free, prior and informed consent to the degree that it could entail a veto right. The Court's opinion that State decisions regarding measures affecting indigenous peoples must first fulfil the consultation check-list and in any case not violate any of these peoples' fundamental rights, should in principle be a sufficiently strong guarantee for their protection, even in cases where consent isn't given. However, it is important to question who will be given the responsibility of determining whether indigenous peoples' rights will be violated or not by a given project, if the opinion of the affected communities is not followed? Although the Court has done an impressive job in interpreting indigenous peoples' rights with the aid of anthropologists, it seems logical that in order to achieve the ideal of self-determination, indigenous peoples themselves must be recognized as fully capable of deciding whether and in what way projects affecting their lands and resources shall be carried out. Only through recognition of the right to free, prior and informed consent may the right of indigenous peoples to "decide their own priorities for the process of development",¹⁹⁰ and to "freely pursue their economic, social and cultural development"¹⁹¹ be fulfilled in a satisfactory manner. Given the Constitutional Court's generally progressive

¹⁸⁹ Sentence SU-383/03, section II.6.1, Botero (2004) p. 381

¹⁹⁰ ILO Convention 169 (1989) art. 7.1

¹⁹¹ ICCPR (1966) and ICESCR (1966) art. 1

interpretation of the constitutional corpus, there is hope that the growing acceptance of the importance of free, prior and informed consent in international law will lead to an evolution of the Court's jurisprudence on this point.

3.6 Concluding remarks on the Constitutional Court's development of indigenous peoples' rights

In its treatment of cases related to indigenous peoples, the Court has clarified the scope and content of the special constitutional rights of these peoples. Through the use of anthropological consultants and ethnography, the Court has engaged indigenous peoples in a hermeneutic dialogue intended to make sense of the law in the many different cultures of the country. As shown by the reference to the Inter-American Court of Human Rights it is not unique in so doing in an international perspective. The large number of diverse ethnic groups in Colombia, however, has presented the Court with an especially difficult challenge: to avoid treating all indigenous peoples generically, as one homogeneous culture opposed to the majority Western civilization. Although not always successful, the thousands of pages of anthropological assessments that the Court has requisitioned from independent experts, much of which has found its way into the jurisprudence, speaks of the seriousness of the Court's efforts. Identifying how fundamental constitutional rights are connected to the question of lands and the environment is particularly important in the context of growing economic interest in natural resource exploitation on the territories of indigenous peoples.

4 Constitutional justice and social change: Effectiveness of the Constitutional Court in protecting indigenous peoples' rights

4.1 The gap between recognition and implementation

Drawing on the findings of the previous chapters, this chapter will analyze the effectiveness of the Constitutional Court's treatment of indigenous peoples' rights. Faced with the wide gap between the legal recognition of indigenous peoples' rights and their implementation in practice, it is pertinent to question whether the Constitutional Court has contributed to improving the situation of indigenous peoples in Colombia, or whether its findings have had little relevance in practice.

4.1.1 The destruction of the Embera-Katíos

To highlight the contrast between the Court's often favourable rulings and the continuing situation of serious and wide-spread human rights violations against indigenous peoples, the example of the Embera-Katío people of Alto Sinú is a sad but important example. The beginning of the predicament of the Embera-Katíos has already been described in this thesis.¹⁹² The Constitutional Court in Sentence T-652/98 was very clear that there had been a violation of the indigenous communities' right to participation and that there existed an immediate threat to the cultural, social and economic integrity of the Embera-Katíos, indeed the survival of the entire people was at stake.¹⁹³ The relevant authorities and the private company responsible for flooding the lands of the Embera-Katíos were ordered to financially recompense the communities for the damage done to them. In addition they were to, with the participation of the indigenous communities; elaborate an "ethno-development plan" which would help the people develop new ways of sustaining themselves as their traditional economic practices were no longer viable. Two years later the Constitutional Court reviewed a new *tutela* concerning the same communities, who protested that the local courts that

¹⁹² A hydro-electric dam was constructed on their lands without a proper consultation process being carried out. The flooding of their lands made it impossible to continue their traditional economic practices, and thus threatened their subsistence. See chapter 3.2, pp. 23-24; and chapter 3.4.2.3 p. 44, *supra*

¹⁹³ Sentence T-652/98, section "Decisión 1".

were responsible for determining the size of the recompense refused to deal with their claim on procedural grounds.¹⁹⁴ Again, the Constitutional Court ruled in favour of the indigenous communities, severely criticizing the lower lever courts for interpreting the case in such a restrictive manner that it led to a violation of fundamental rights. All would seem to be well, as the Constitutional Court left no room for doubt as to the legal entitlements of the indigenous communities, and gave detailed orders to the responsible actors.

However, the human rights of the Embera-Katíos continue to be systematically violated, as documented by United Nations Special Rapporteur Stavenhagen. After the ruling of the Constitutional Court in 1998, violence against the Embera-Katíos communities escalated. Many were forcibly displaced, property was destroyed and several leaders were murdered or forcibly disappeared, both by paramilitaries and guerrillas.¹⁹⁵ In 2001 the Inter-American Commission on Human Rights granted precautionary measures to the community and its leaders, and repeatedly asked the Colombian government to take urgent steps to protect the lives and physical integrity of members of the community.¹⁹⁶ Despite this attention, killings and forced disappearances have continued to decimate the Embera communities. The government has not taken the necessary measures to protect the Embera-Katío people, who've seen many of their most prominent leaders assassinated since 1998.¹⁹⁷

Instead of following the court's orders to create an "ethno-development" plan which would benefit the entire community, the implicated company has paid a monetary recompense directly to the individuals that were forced to move because of the flooding of their land. According to reports published by indigenous organizations in Colombia, such an unprecedented flow of cash into a culture unused to a monetary economy has contributed to an escalation of alcoholism, prostitution and the abandonment of ancestral territories and cultural practices.¹⁹⁸

The legacy of the dam that was built on the lands of the Embera-Katíos without their consent is violence and persecution, social disorganization and cultural destruction.

¹⁹⁴ Sentence T-1009/00

¹⁹⁵ Stavenhagen (2003), p. 14

¹⁹⁶ Inter-American Commission on Human Rights (2001)

¹⁹⁷ Stavenhagen (2003) p. 15

¹⁹⁸ Vélez (2006)

Stavenhagen stated in 2003 that there was a very real risk that the Embera-Katíos would not survive as a distinct people, and called it “a clear case of ethnocide”.¹⁹⁹

This case hints at how powerful economic actors both influence state authorities and employ violence in pursuit of their interests. The unconstitutional authorization of the construction of the dam, the unwillingness of the lower level courts to grant a fitting recompense on the grounds of minor technicalities, and the campaign of grave and systematic violations of human rights and international humanitarian law may all be due to pressure from sectors seeing the presence of the Embera-Katíos as hindering economic development. This is not a unique case, in fact the indigenous organization ONIC maintains that economic megaprojects are the main cause of conflict between the government and indigenous peoples in Colombia.²⁰⁰

4.2 Measuring the results of the Constitutional Court’s practice

4.2.1 The constitutionalization of daily life

To evaluate the results of the Constitution and the Constitutional Court in the fifteen years they’ve been in existence, we must look at what changes they have contributed to bring about. High hopes were attached to the new Constitution, as its democratic and progressive character seemed destined to transform the relations between the country’s social forces and create a more legitimate political and social order. However, if the Constitution and the jurisprudence of the Constitutional Court were to be interpreted from an analytical perspective that sees the relation between law and social change in instrumental terms, the current political, economic and social conditions in Colombia would be a testimony of their resounding failure.²⁰¹ With regard to indigenous peoples, the very serious situation of human rights violations that they endure, and which has even gotten worse since the late nineties, would indicate that the Court has not succeeded in its efforts to ensure the protection of their rights.

However, if we don’t demand a relation of direct causality between the law and social change, it is easier to appreciate the positive effect made by the Constitution and the Court.²⁰² Restrepo argues that the Constitution and the constitutional jurisprudence should be evaluated from an analytical perspective in which law and social order are

¹⁹⁹ Stavenhagen (2003) p. 15

²⁰⁰ *ibid.*

²⁰¹ Restrepo (2002) p. 5

²⁰² *ibid.*

interconnected, in the sense that the law is conceived of as organizing the world in categories and concepts that influence people's conscience and awareness, and in turn determine and restrict human action.²⁰³ This renders a more nuanced and complex analysis, in which it is possible to identify important changes in the general human rights situation both of indigenous peoples and other oppressed groups, despite the disheartening statistics of poverty and violence.

Restrepo calls the most important effect of the Court's jurisprudence "the constitutionalization of daily life".²⁰⁴ This means that the language and opinions of the Constitutional Court have entered into the sphere of daily life of ordinary citizens, and raised their consciousness of what constitutional rights mean to people in practice. The judicial mechanisms for protecting rights have made constitutional justice the most visible means of justice to the common citizen, and progressive decisions by the Court have made it an important protagonist among the country's institutions.²⁰⁵ A generalized lack of faith in the intentions and effectiveness of other State institutions only serve to reinforce this tendency. When the Court in its rulings identifies a situation of social oppression and devises a remedy for it, it establishes a "constitutional dialogue" with citizens that recognize their own situation in the Court's decision and become increasingly aware of their rights.²⁰⁶ The perception that constitutional justice addresses real and recognizable injustices inspires a belief in many that their situation is possible to remedy. This in turn may lead people to finding ways of organizing themselves to try and improve their situation through collective action, and Restrepo concludes that in this way the discourse of the Constitutional Court has contributed to strengthening the social movements of Colombia.²⁰⁷

4.2.2 Progress in the situation of indigenous peoples

The Colombian indigenous movement is one of the few cases of continuous social organization in the country during the last 40 years. Prior to the Constitution of 1991 their struggle focussed on recovering their lands, physically and legally. The Constitution's ample provisions on the multicultural character of the Colombian nation, and the Constitutional Court's interpretation of the content of the right to cultural, social

²⁰³ *ibid.* p. 6

²⁰⁴ *ibid.*

²⁰⁵ Rodríguez (2003) p. 156

²⁰⁶ Restrepo (2002) p. 6

²⁰⁷ *ibid.* p. 7

and economic integrity paved the way for another kind of claims from indigenous peoples.²⁰⁸ Indigenous individuals and communities have actively used the *tutela* mechanism to claim full recognition of their right to remain culturally different from the majority society, while at the same time demanding to be recognized as full citizens.²⁰⁹ The fact that the Court early on set the standard for its progressive line of interpretation was an encouragement to indigenous organizations. The belief that organized action through the legal system could bring fair results has promoted non-violent mobilization by indigenous communities, and thus reduced the likelihood of them abandoning their neutrality in the armed conflict.

The claims of cultural diversity have taken many forms, some of which have been discussed in this thesis. The recognition of indigenous communities as collective subjects of fundamental rights is a good example,²¹⁰ as the Court accepted that the primacy of the individual, prevalent in Western legal tradition, was inadequate to protect the well-being of indigenous peoples. The introduction of this element into the Court's jurisprudence was a clear sign that the celebrated notion of a pluralist state could become reality after all, encouraging increased participation of indigenous peoples.

The invitation to anthropologists to participate as expert witnesses and consultants in the Court's proceedings has increased the magistrates' knowledge of indigenous cultures, and the way the Court disseminates that knowledge through its case law is likely to have an educational effect also on other state institutions and society in general.

In the case of recognition of land rights, which had begun some ten years prior to the Constitution, the rulings of the Constitutional Court have speeded up the formalization of indigenous peoples' collective land titles and thus contributed to improving the situation of legal defencelessness in which many communities were living. The very important issue of natural resources and protection of cultural, social and economic integrity of indigenous peoples has brought groundbreaking decisions by the Court, invoking fundamental rights as the right to life and the freedom from forced disappearance. On a practical level, the Court has contributed to establishing formal

²⁰⁸ ibid. p. 11

²⁰⁹ Botero (2004) p. 395

²¹⁰ See section 3.1, *supra*

safeguards for these fundamental rights, creating clearly defined legal standards for projects affecting indigenous territories.

4.2.3 Obstacles to implementation of indigenous peoples' rights

Despite these important gains, favourable Court rulings are no guarantee of an improving human rights situation, as shown by the case of the Embera-Katíos of Alto Sinú. There is a lack of coherence between what the law and the constitutional jurisprudence says, and how this is implemented throughout the country. Several factors can be identified that help explain this situation: the slowness of attitudinal change; the internal armed conflict and the illicit drug economy; and the precariousness and corruption of the Colombian state.

4.2.3.1 Racism

Indigenous peoples in Colombia have for a long time been considered and treated as secondary citizens, stemming from a deeply ingrained racist belief that they are “savages” lagging behind on the path to development. Even today there is a widely held perception that indigenous peoples, in protesting against development projects affecting their lands, are selfishly hindering sorely needed economic development of the State. The relationship between the State and the indigenous communities has often been one of confrontation, as the communities have resisted the State’s policies of assimilating them into the cultural, economic, political, social and religious model of majority society.²¹¹ Despite the constitutional changes, the old attitude to indigenous peoples still persists in many State agencies and the population at large, influencing administrative practices and even court decisions.²¹² Such perceptions take a long time to change, which partially explains the gap between legislation and implementation. The efforts of the Constitutional Court are very important in this respect; as its commitment to cultural diversity and the language and ideas that characterize its opinions will hopefully, in the sense of Restrepo’s “constitutionalization of daily life”, gradually influence the attitudes of the population, paving the way for a conciliation of interests between indigenous and non-indigenous people.²¹³

²¹¹ Ortega (2000) p. 12

²¹² *ibid.* p. 37

²¹³ Botero (2004) p. 409

4.2.3.2 The internal armed conflict and the drug industry

As was explained in chapter 1, the armed conflict in Colombia affects indigenous peoples disproportionately, mainly because of the strategic and economic importance of their territories. The efforts of insurgents, state forces and paramilitary groups to make indigenous communities submit to their control have had catastrophic consequences, leading some groups to the brink of extinction. The appropriation of indigenous lands for growing illicit crops and the government strategy for eradicating those same crops combine to forcibly displace indigenous communities and destroy their livelihood. These factors are, however, obviously far outside the Constitutional Court's field of competence and their existence cannot be taken as a sign of the Court's failure. The Court has no enforcement capacity of its own; it is the security forces under the command of the executive branch of government that are responsible for guaranteeing the security of the citizens, including the suppression of illegal, armed groups. What the Court is doing in this situation is to review the constitutionality of the practices that the executive power employs in its counter-insurgent struggle and the "war on drugs", insisting on the non-derogable character of fundamental rights, whatever the circumstances.

4.2.3.3 Political corruption and institutional weakness

The solid hold of a land-owning oligarchy on the political and economic life of Colombia has effectively dominated the state since its inception.²¹⁴ This perceived lack of legitimacy combined with the weak nature of its institutions means that the State has been and continues to be unable and/or unwilling to provide adequate protection of the rights of a majority of the population.²¹⁵ This is especially true in the case of indigenous peoples, whose economic, social and political marginalization have made them vulnerable to attempts to seize their lands for economic exploitation, be it through violence or legal reform. The Constitutional Court has consistently opposed the abuse of power of the political-economic elite, through expanding the population's understanding of constitutional rights and establishing safeguards needed to uphold the democratic ideals of the Constitution. Even in this situation of conflict between the state powers, the Court cannot go beyond its role as interpreter of the Constitution; the enforcement of its decisions is left to the executive and legislative powers. Their lack of

²¹⁴ Rodríguez (2003) p. 141

political will and capacity, both being symptoms of widespread corruption, to implement constitutional rights when that would mean contradicting the interests of the oligarchy, helps to explain why indigenous peoples still have to fight for their lands and resources fifteen years after the new Constitution was created.

4.3 Concluding remarks

This evaluation of the results of the Constitutional Court's efforts to protect indigenous peoples' rights brings up two different but interrelated issues: the monitoring of the State's fulfilment of the Constitution, and the so-called "constitutionalization of daily life".

The first is an ordinary control function of courts; overseeing that the Constitution's bill of rights is upheld and ordering remedial action when it isn't. In the case of indigenous peoples, the Court through its constitutional reviews has tried to ensure their on-going self-determination, recalling Anaya's expression.²¹⁶ In so doing it has made important contributions to the interpretation of indigenous peoples' rights, drawing on the one hand on international human rights instruments as well as national law, and on the other on anthropological accounts of the diverse cultures of Colombia.

On a theoretical level this labour has been very successful, in that Colombia's legal provisions for protection and advancement of indigenous peoples is quite progressive by international standards. On a more practical level, the problem of insufficient implementation continues to mar Colombia's human rights record, and the situation for many indigenous peoples is critical, even approaching ethnocide.

The discrepancies between legislation and implementation are partially explained by the identification of social and political factors particular to the Colombian context. Taking these into account, indications are that the Constitutional Court is doing what it can within its mandate to protect the integrity of the bill of rights set down in the Constitution of 1991, and that the country's serious short-comings in implementation would have been much worse without the Court's efforts.

The second issue; the "constitutionalization" of society, is a constructive practice which may help raise people's consciousness about the scope and content of their constitutional rights, thus strengthening social organization and hopefully contributing to increased democratization in the long term. Concerning the right to cultural diversity,

²¹⁵ *ibid.* pp. 138-139

this awareness-raising is equally important for indigenous and non-indigenous Colombians. The Court plays a very important role in pointing out the legal and moral fallacies in considering indigenous peoples to be anything other than full citizens with equal dignity and rights. This will hopefully contribute to change racist conceptions that are hindering recognition of indigenous peoples' rights and preventing joint action with other marginalized groups.

As regards the integration of indigenous peoples into Colombian society, respecting the constitutional principle of cultural diversity, the frequent use by indigenous peoples of the *tutela* mechanism indicates that there is a widely held faith in the Constitution of 1991 and the Constitutional Court's ability to ensure justice and fairness to all citizens, irrespective of ethnic and cultural background.

²¹⁶ See chapter 2.4.1, *supra*

5 Conclusion

Indigenous peoples' rights compose an area of international law which is still developing, and this process is being driven forward both by international institutions and national legislative and legal practice. Comparative studies of different national systems and practices can be very useful, both for establishing the current state of international law concerning indigenous peoples and for promoting progressive ideas that are shown to work. In this thesis, I have given an account of the protection of indigenous peoples' rights in Colombia, focusing on the Constitution and the work of the Constitutional Court.

The case law of the Constitutional Court provides progressive interpretations of indigenous peoples' rights, largely because of two elements of the way the Court has chosen to exercise its mandate. Firstly, the Court is true to the constitutional principle of interpreting the Constitution in accordance with international human rights treaties ratified by Colombia, and as such has been able to take a comprehensive human rights approach in its cases.²¹⁷ Secondly, the Court has attempted to make real and effective the Constitution's consecration of cultural diversity as a fundamental principle of the nation. By entering into a hermeneutic dialogue with indigenous peoples, using anthropological consultants and ethnography as aides in the difficult task of cultural translation, the Court has shown that the Constitution is equally relevant to all ethnic and cultural groups coexisting within what the Court calls the multicultural Colombian Nation.²¹⁸

The Court's practice provides an example of how the concept of human rights may be made compatible with systems of thought that don't share the Western notion of individualized subjects of rights. As such it could become an important point of reference for the treatment of indigenous peoples in other countries and international organizations, as well as for a more general debate about the universality of human rights.

²¹⁷ Political Constitution of Colombia (1991) art. 93

²¹⁸ Sentence T-634/99, section II.1.3

By analyzing the case law of the Constitutional Court related to lands and natural resources of indigenous peoples, I have identified the scope and content of the constitutional protection against human rights violations arising from what I referred to in the introduction as “the second conquest”: the exploitation of natural resources on indigenous peoples’ territories. Especially important in this respect is the Court’s opinion that the destruction of an indigenous community’s natural environment threatens the rights to life, cultural integrity and the freedom from forced disappearance, potentially amounting to ethnocide. To protect against such violations, indigenous peoples have a fundamental right to participation in all matters affecting them, exercised by way of prior consultation. Although the Court does not consider that the right to participation includes a right to prior consent, it has established very precise demands for consultation processes.

The recognition of indigenous communities as holders of fundamental rights, including collective property of their lands and cultural, social and economic integrity, is fundamental to the self-determination of these peoples. Through the process of “constitutional dialogue”, indigenous peoples acquire greater knowledge and consciousness of their rights and the judicial means to protect them. This strengthens the organizational capacity of the indigenous movement, which is conducive to create effective resistance to the extremely difficult situation that indigenous peoples face in Colombia today. In a context of internal armed conflict and rapid implementation of neo-liberal policies, indigenous peoples must use all the tools at their disposal to protect themselves and their cultural heritage. The *tutela* mechanism has proven to be a hugely effective tool, at least in terms of achieving explicit recognition of how the constitutional rights of indigenous communities are to be interpreted in practice. In the sense of “constitutionalization” of society, such recognition provides the basis for a conciliation of interests between indigenous peoples and other marginalized groups, encouraging collective strategies for social and political mobilization with the aim of securing the fulfilment of constitutional rights.

I have identified several contextual factors which contribute to explain the discrepancy between legislation and implementation of indigenous peoples’ rights in Colombia. Racism, corruption and the armed conflict all play a part in the catastrophic human rights situation of indigenous peoples. Underneath it all, the deeply entrenched hold of a minority elite on the political and economic powers of the country prevents the

construction of a fully functional State, capable of mediating social conflicts in a non-violent manner.

Despite this extremely difficult context for constructing a regime that adequately respects the rights of citizens, among them indigenous peoples, it is my contention that the Constitutional Court's efforts have served to prevent the situation from deteriorating further. Despite the difficulty of predicting Colombia's political development, it is likely that the solidity of the Constitutional Court's jurisprudence will in the long run help indigenous peoples consolidate their legal status and rights. Hopefully, the rightful place of indigenous peoples as equals in a multicultural society will one day cease to be merely a theoretical concept and become reality.

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